(1)

No. 91-584

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SOUTHERN PACIFIC TRANSPORTATION COMPANY, et al.,
Petitioners,
vs.
THE CITY OF LOS ANGELES, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a Court of Appeals have jurisdiction to recall its mandate, amend its opinion, and change its judgment *sua sponte* merely to correct a perceived error in law, *after* the time to petition for rehearing has passed, *after* the judgment to dismiss the action for lack of jurisdiction has been entered and the mandate issued, and *after* the District Court has vacated its judgment and dismissed the action?

2. In evaluating a land use ordinance, the avowed purpose of which was to prevent development to lower the cost of public acquisition, does a court properly protect the property owners by evaluating their claims under the equal protection clause and the due process clause at a lower level of scrutiny than would be accorded to claims under the takings clause?

3. Is it proper to award summary judgment against a plaintiff's facial equal protection and due process claims in the complete absence of evidence in the record and of judicially noticeable facts that could provide a rational basis for the classification at issue?

4. Before a plaintiff's as-applied constitutional claims are ripe for adjudication, must it (i) pursue administrative remedies that are not available as a matter of law under the legislation in question, and (ii) seek amendment of the challenged legislation itself?

PARTIES TO THE PROCEEDING

Petitioners are Southern Pacific Transportation Company, a corporation,* George Gregson, Patricia Gregson Millington, and Edwin J. Gregson, individuals.

Respondents are the City of Los Angeles, a municipal corporation, and The California Department of Transportation, a department of the State of California.**

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* Pursuant to Rule 29.1, following is a list of the parent companies and non-wholly owned subsidiaries of Petitioner Southern Pacific Transportation Company:

Parent companies:

1. The Anschutz Corporation
2. Rio Grande Industries, Inc.
3. SPTC Holding, Inc.

Subsidiaries, other than wholly-owned subsidiaries:

1. St. Louis Southwestern Railway Co.
2. Central California Traction Company
3. The Ogden Union Railway & Depot Co.
4. Portland Terminal Railroad Co.
5. Portland Traction Co.
6. Sunset Railway Co.
7. Trailes Train Co.
8. Harbor Belt Line RR
9. The Alton Southern Ry Co.
10. Arkansas & Memphis Ry. Bridge & Term. Co.
11. Southern Illinois & Missouri Bridge Co.
12. Terminal RR Assoc. of St. Louis
13. San Marco Pipeline Co.

** Pursuant to settlement, former defendants County of Los Angeles and Los Angeles County Transportation Commission were dismissed from the case during the appeal.

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PETITION FOR WRIT OF CERTIORARI

Southern Pacific Transportation Company, George Gregson, Patricia Gregson Millington, and Edwin J. Gregson, hereinafter the Petitioners, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The three opinions of the Court of Appeals were filed September 7, 1990 (App. C), November 9, 1990 (App. B), and December 4, 1990 (App. A). The third opinion is reported at 922 F.2d 498; the others are unreported. The first unreported judgment of the Court of Appeals was dated September 7, 1990 (App. I), and the

unreported order of the District Court vacating its judgment and dismissing the entire complaint without prejudice following that judgment was entered October 11, 1990 (App. J).

The District Court's initial unreported order and memorandum opinion granting and denying summary adjudication of certain issues were filed May 20, 1988 (App. E), and its subsequent unreported order, judgment and memorandum opinion granting summary judgment to defendants were filed December 12, 1988 (App. D, H). The Court of Appeals denied Petitioners' Emergency Motion to Vacate its Amended Opinion on December 4, 1990 (App. G).

JURISDICTION

The Court of Appeals denied Petitioners' timely Motion for Reconsideration and Suggestion for Rehearing En Banc on March 26, 1991 (App. F). On June 17, 1991, Justice Sandra Day O'Connor issued an Order extending Petitioners' time to file this Petition for Writ of Certiorari to August 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In this case Petitioners seek the protection of the due process, equal protection and just compensation clauses of the fifth and fourteenth amendments of the United States Constitution and the Civil Rights Act, 42 U.S.C. § 1983, because of two City of Los Angeles ordinances downzoning their property to the sole use of surface parking for the avowed purpose of preventing development prior to public acquisition for transportation

purposes. The pertinent parts of the constitutional, statutory, and regulatory provisions are:

Fourteenth Amendment:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
> U.S. Const. amend. XIV, § 1.

Fifth Amendment:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
> U.S. Const. amend. V.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

City Ordinances: The subject Los Angeles Zoning Ordinances, 160414, 160415 are in Appendices L.3 and M.3 and provide, in pertinent part:

> The use of the subject property shall be limited to surface automobile parking.

Los Angeles City Charter § 98 is in Appendix N.

STATEMENT OF THE CASE

A. Introduction

This case presents important due process and equal protection questions arising out of the City of Los Angeles' ("City") use of its zoning power to rezone Petitioners' land in 1985 for surface parking in an area zoned for commercial development in order to preclude the building of structures and to depress the market price pending public acquisition of Petitioners' land for a proposed light rail transit system.[1] The first question concerns the "rational basis" level of scrutiny the Court of Appeals used to evaluate Petitioners' due process and equal protection claims compared to the "heightened scrutiny" generally used to evaluate takings claims. The second concerns the evidence considered in applying the rational basis to the facial due process and equal protection claims: does a court need to evaluate the actual (improper) purpose behind enactment of the zoning ordinance, or may it close its eyes to this evidence and consider only purposes fabricated by defendants solely to prevail in litigation. The third question concerns

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[1] The Planning Commission of the City of Los Angeles stated that purpose of the rezoning as follows: "preserving it [Petitioners' land] for a future rapid transit use by imposition of a permanent surface parking zone. . . . [T]o insure that no structures will be constructed on the subject property which will prevent or materially inhibit the acquisition and use of such property for rapid transit or other transportation facilities. . . ." App. L.2, at L10-11.

whether due process and equal protection claims are ripe upon enactment of a zoning ordinance which permits no development or variances for permanent use other than surface parking, or whether Petitioners must still make a futile development application and seek a change in the legislation. Finally, this case presents an important and novel procedural question as to whether a Court of Appeals has jurisdiction to recall its mandate and change its judgment when no party has so requested, and the District Court has dismissed the entire action in accordance with the first mandate.[2]

In 1985, the City was negotiating with other governmental agencies[3] regarding use of the Petitioner's properties for public highway widening or light rail use. During meetings, the governmental entities learned that Petitioners had been successful in obtaining Interstate Commerce Commission approval to abandon railroad service on these valuable properties located in the Century City area of west Los Angeles, and that the properties would likely be developed before the government entities could arrange financing and complete the environmental review which is necessary prior to public acquisition. In response, the City was urged by the other defendants to use is zoning power to freeze the properties in their undeveloped state pending future acquisition.

The City Council thus initiated an ordinance directed solely at these two properties (the abandoned railroad rights-of-way), downzoning them from their prior zoning classifications that matched those of surrounding proper-

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2 Petitioners' takings claims are not raised in this petition.

3 Those agencies included Respondent California Department of Transportation ("Caltrans") and former defendants County of Los Angeles and Los Angeles County Transportation Commission.

ties (some residential, some low-density commercial, some low-density light industrial), to a classification permitting a single permanent use — surface parking, with no above-ground or below-ground structures.

The City followed its normal procedures of holding public hearings before a Hearing Examiner and before the full Planning Commission. The Hearing Examiner made a factual finding that the rezoning of the Sepulveda property could not be supported as good zoning practice. At that point normal procedures ceased. Following a meeting between the Chief Hearing Examiner and the City Councilman for the area in which they discussed the Councilman's desire to enact a zoning ordinance that would hold the property in its undeveloped state, the Chief Hearing Examiner changed that factual finding. This meeting was held in contravention of normal City procedures, which require Hearing Examiners to render impartial decisions.

The findings of both the Hearing Examiners and the Planning Commission candidly admit that the properties were being rezoned to surface parking to freeze the value of Petitioners' property pending acquisition of the land by defendants for public transportation. In regard to Petitioners' Santa Monica Boulevard property, the Commission stated that "*the recommended change of zone would be in conformance with the Plan's goal in preserving the Santa Monica Corridor for eventual rapid transit needs of the area.*" (emphasis added). App. L.1, at L3. With regard to the Sepulveda Boulevard property, the Commission stated "*that it is essential that construction of any buildings or structures be restricted until it can be determined whether all or any part of this right of way will be required for public transportation use.*" (emphasis added). App. M.1, at M1.

When the City Councilman for the District where the property is located heard a rumor that someone had approached the Planning Department about obtaining a building permit to build a structure on the property, he rushed the matter to City Council as an emergency ordinance, where normal procedures of giving notice to the property owners and City Council Committee hearings are waived. The Council passed a motion which was represented as incorporating the findings made by the Planning Commission. Actually, the findings presented and adopted were not those approved by the Planning Commission but were fabricated findings designed to conceal the defendants' improper purpose.[4]

The City Council adopted the ordinance without any hearing, receipt of evidence, or written staff report, making these two properties the *only* properties in the entire City of Los Angeles zoned for surface parking only, except for an infamous toxic waste dump.

Petitioners brought this suit: First, because of the inherent unfairness of singling out Petitioners' land for parking when the public as a whole would enjoy the ultimate transportation use (Petitioners sought declaratory relief and damages for the loss of economic viability); Second, because Southern Pacific was very concerned about the proliferating use of the zoning power of cities and other government entities to depress the value of former railroad rights-of-way pending public acquisition. The City of Los Angeles, for example, had previously downzoned other properties prior to acquisition,

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[4] Based on warnings from the City Attorney's office that the true findings would expose the City to damages in a lawsuit by the owners for taking without payment of just compensation, the Chief Hearing Examiner again departed from normal procedure by "sanitizing" the Planning Commission's findings, deleting any reference to intent to acquire.

causing a California appellate court to state in another case that the City had a policy of improper use of the zoning power. That court condemned the practice as a taking and violation of equal protection.[5] *People ex rel. Dep't of Public Works v. Southern Pacific Transportation Co.*, 33 Cal.App.3d 960, 109 Cal.Rptr. 525 (1973).

B. Background and Proceedings Below

Petitioners filed their complaint alleging violation of their federal constitutional rights under the due process, equal protection, and takings clauses, and corresponding state constitutional claims, in the District Court for the Central District of California on January 30, 1986.[6] In May 1988, the District Court, ruling on Petitioners' and defendants' cross-motions for summary judgment, ordered that Petitioners' facial claims were ripe, but that the as-applied claims were unripe. App. E. In December 1988, after granting the City's motion for reconsideration, the District Court held that the facial taking claims were unripe. On its own motion, it reversed its earlier order denying summary judgment on the federal due process and equal protection claims. Despite the fact that much of its ruling was on jurisdictional grounds, it purported to enter summary judgment for defendants. App. D.

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[5] Respondent State of California was a party to that action. Although the City was not a party, the Court based its decision on the testimony of City Planning Department witnesses.

[6] The District Court dismissed defendant Caltrans on Eleventh Amendment grounds, and that ruling is not a basis for this petition. Petitioners have initiated an action in state court based on the claims not decided on the merits by the federal courts below. *Southern Pacific Transportation Co., et al. v. City of Los Angeles, et al.*, Case No. WEC 133177, Los Angeles County Superior Court.

Petitioners timely appealed, and on September 7, 1990, the Court of Appeals rendered its Opinion ("First Opinion") and judgment that all claims were unripe, but holding that the correct disposition of unripe claims was dismissal rather than judgment. App. C, I. Accordingly, mandate was issued, and on October 11, 1990, the District Court vacated its judgment and dismissed the entire complaint without prejudice. App. J. None of the parties moved for reconsideration.

On November 9, 1990, without recalling its mandate, the Court of Appeals *sua sponte* issued an amended Opinion ("Second Opinion"), which differed from the First Opinion by ruling that summary judgment was proper on the facial due process and equal protection claims. App. B. No mandate was issued.

On November 21, 1990, Petitioners filed an emergency motion to vacate the November 9, 1990 Opinion, which was denied on December 4, 1990. App. G. Also on December 4, 1990, however, the Court of Appeals recalled the mandate, issued a new Opinion substantively identical to the November 9, 1990 Opinion ("Third Opinion") (App. A), and issued a mandate directing the District Court to enter judgment accordingly, which was entered December 28, 1990. Petitioners' motion for rehearing was denied.

Petitioners now petition the United States Supreme Court for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I

THE COURT OF APPEALS' ACTION IN RECALLING ITS MANDATE AND AMENDING ITS JUDGMENT *SUA SPONTE*, WITH NO STATED REASON, AFTER THE ACTION HAD BEEN DISMISSED, RAISES AN IMPORTANT JURISDICTIONAL QUESTION THAT IS UNRESOLVED BY THIS COURT AND ON WHICH THE NINTH CIRCUIT IS IN CONFLICT WITH SIX OTHER CIRCUITS.

This Court has never ruled on the issue whether a Court of Appeals has equitable jurisdiction to recall its mandate to amend its opinion and judgment on its own motion after the time permitted for petition for rehearing, and after the District Court has dismissed the action in accordance with the mandate, and merely to correct a perceived error in law. The First, Second, Fifth, Sixth, Eighth, and District of Columbia Circuits have held that a mandate can be recalled *only* upon motion of a party and in extraordinary circumstances because of the strong public policy that there should be an end to litigation. *See, e.g., Powers v. Bethlehem Steel*, 483 F.2d 963 (1st Cir.), *cert. denied*, 414 U.S. 856 (1973); *accord Hines v. Royal Indemnity Co.*, 253 F.2d 111 (6th Cir. 1958); *accord Greater Boston Television Corp v. F.C.C.*, 463 F.2d 268 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1971). The Ninth Circuit's action conflicts with these decisions.

On appeal, the Ninth Circuit Court of Appeals rendered its First Opinion on September 7, 1990 and issued a mandate to the District Court to vacate its entire

judgment and to dismiss all of Petitioners' claims without prejudice as unripe. None of the parties petitioned for rehearing. On October 15, 1990, the District Court entered judgment in compliance with the Court of Appeals' mandate. At that point, the Court of Appeals no longer had jurisdiction over the action. As the Second Circuit has stated: "The issuance of the mandate from this Court terminated this Court's jurisdiction." *United States v. Dilapi*, 651 F.2d 140, 144 (2d Cir. 1981), *cert. denied*, 455 U.S. 938 (1982).

On November 9, 1990, without recalling its mandate and, further, *without having jurisdictional power to recall its mandate*, the Court of Appeals *sua sponte* purported to issue the Second Opinion. For reasons unknown to the parties and without any opportunity to brief the merits, the Court of Appeals amended its opinion to determine that the correct disposition of the facial equal protection and due process claims was judgment for Defendants. App. B.

On December 4, 1990, the Court of Appeals denied Petitioners' motion to vacate the Second Opinion, but attempted to correct its erroneous amendment of the First Opinion. This attempt only made matters worse. Instead of properly letting its First Opinion and judgment stand, the Court of Appeals purported to recall its mandate, file a new opinion, and issue a mandate to the District Court to enter judgment accordingly. In fact, this Third Opinion, aside from stating these procedural steps, is identical to the invalid Second Opinion, and these maneuvers were accomplished without notice, hearing, or showing of good cause. App. C. Nothing the Court of Appeals did on December 4, however, could cause it to regain jurisdiction over the matter because the entire case had previously been dismissed from the federal court system on October 11, 1990, and no motion of

a party or injustice provided a basis for recalling the mandate. Petitioners argued these defects in an unsuccessful motion for reconsideration.

The Court of Appeals' actions have created a split among the Circuits. Whereas the First, Second, Fifth, Sixth, Eighth, and District of Columbia Circuits have held that the Courts of Appeals have equitable jurisdiction to recall a mandate only (1) upon motion of a party and (2) to prevent manifest injustice, the Ninth Circuit has decided that mandate may be recalled (1) on a court's own motion (2) to correct mere errors in law, and (3) without notice or opportunity for hearing.

This action of the Ninth Circuit Court of Appeals disturbed a settled case after the parties had thought it was laid to rest, simply to attempt to correct a perceived erroneous ruling of law. However, "erroneous rulings of law are generally not held to be sufficiently unconscionable to justify reopening a judgment not void when issued." *Powers*, 483 F.2d at 964 (citing decisions from the Sixth and Eighth Circuits). Similarly, the Fifth Circuit has stated that mandate can be recalled only "to prevent injustice." *Gradsky v United States*, 376 F.2d 993, 995 (5th Cir.), *vacated*, 389 U.S. 18 (1967). The Sixth Circuit phrases the rule as: "A mandate once issued will not be recalled except by order of the court for good cause *shown*." *Hines*, 253 F.2d at 114 (emphasis added). Only the parties can "show" good cause, implying that a court may not on its motion without notice or hearing recall its mandate. The District of Columbia Circuit stated that the rules developed by these circuits amount to "a doctrine for recall of mandate [that is] broadly rooted in a showing of 'good cause' and the need to 'prevent injustice,' [and that] the 'power to recall mandates should be exercised sparingly' and is not to be availed of freely as a basis for granting rehearings

out of time for the purpose of changing decisions *even assuming the court becomes doubtful of the wisdom of the decision* that has been entered and become final." *Greater Boston Television Corp.*, 463 F.2d at 277 (emphasis added) (citing *Estate of Iverson v. Comm'r*, 257 F.2d 408, 409 (8th Cir.), *cert. denied*, 358 U.S. 893 (1958)).

The high purpose behind refusing to disturb judgments in the absence of compelling circumstances is: "There must be an end to dispute." *Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir.) (denying a motion to recall mandate), *cert. denied*, 379 U.S. 973 (1965). "There must be . . . 'exceptional circumstances,' in order to override the strong policy of repose, that there be an end to litigation." *Greater Boston Television Corp.*, 463 F.2d at 278 (quoting *Hines*, 253 F.2d at 114). The Ninth Circuit has flaunted these ideals of repose, in derogation of the mandate doctrine consistently developed in other circuits. The Ninth Circuit has rejected this case law in favor of a Kafkaesque version of appellate review in which litigants in the Ninth Circuit cannot be sure of the finality of a judgment, fearing that the panel will hurl down a new and different decision, without notice, without hearing, without stated reasons, and without jurisdiction.

This question has never been addressed by this Court. Petitioners therefore request that the Court grant this petition and then adopt a uniform rule that equitable jurisdiction to recall a mandate if it exists at all, may be exercised only upon motion of a party to prevent injustice. This rule will resolve a conflict among the circuits, and will affirm the importance of an end to litigation.

II.

THE COURT OF APPEALS' TREATMENT OF THE EQUAL PROTECTION AND DUE PROCESS CLAIMS DEPRIVED PETITIONERS OF THE HEIGHTENED LEVEL OF SCRUTINY TO WHICH THOSE CLAIMS SHOULD BE ENTITLED.

The Third Opinion purported to summarily dispose of Petitioners' facial substantive due process claim on the "rational basis" standard in a single paragraph, stating:

> The prevention of traffic congestion is reason enough to justify the targetted ordinance. Appellants have not made sufficient factual allegations suggesting that zoning their property was irrational. Accordingly, the zoning classification does not on its face violate the due process clause.

App. A, at A21. The facial equal protection claim received more cursory treatment:

> The City has set forth plausible reasons for its zoning policy and for its decision to focus on narrow strips of land such as appellants'. Presumably, the zoning might have been more equitable, perhaps even more logical, but on its face, the ordinance displays no outward sign of irrationality.

App. A, at A21. In its haste to correct what it apparently believed was an error of law in its First Opinion, the Court of Appeals rendered a decision on the merits on the facial equal protection and substantive due process claims in litmus fashion without any apparent review of the record, and without consideration of the importance

of the issues being decided, or the appropriateness of deciding those issues by summary judgment. If this Court decides that the Third Opinion survives jurisdictional review, Petitioners request a more careful consideration of these claims that is justified by their constitutional origin.

The Court of Appeals did correctly recognize that equal protection and substantive due process claims involve a two-prong analysis: first, whether the governmental interest involved is a legitimate one and second, whether there is an adequate nexus between the challenged ordinances and the legitimate governmental interest.

In this case, the City advanced in its arguments a single justification for the ordinance — preventing the exacerbation of traffic congestion by prohibiting new development. Petitioners have never contested that preventing traffic congestion is a legitimate and even laudable state goal. However, all the evidence showed that the actual and improper purpose was to freeze or depress the value of the property pending its acquisition, and that defendants held no hearings and conducted no studies which verified the debatable proposition that light commercial development would attract more cars than gigantic surface parking lots.[7]

Initially, Petitioners invite the Court to consider the important unresolved question whether the rational basis standard is the proper level of inquiry when the plaintiff's claim is that the government enacted a zoning ordinance *for an avowed purpose which would evade the just compensation requirement of the constitution*, and

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[7] The recommendations and findings of the Planning Commission do not even mention the goal of traffic reduction. *See* App. L.1, L.2, M.1, and M.2.

thus that the ordinance does not advance a *legitimate state interest.*

*Nollan v. California Coastal Comm'*n, 483 U.S. 825 (1987), held in a case based upon the incorporated Takings Clause that an ordinance does not advance a legitimate state interest if it is used as a device to avoid the payment of just compensation. *Nollan* stated:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

Id. at 482. The *Nollan* Court stated that the "substantial advancement" test it applied to that takings challenge differed from the "rational basis" test traditionally used for substantive due process and equal protection cases. *Id.* at 834 n.3. This Court has never addressed, however, the level of scrutiny to be given to a due process or equal protection claim, when as here the gravamen of the action is that the ordinance does not advance a legitimate state interest *because it was adopted as a device to avoid the just compensation requirement.* In this situation, there is no logical or fair reason not to apply the heightened scrutiny used in takings cases.

Petitioners challenging an ordinance enacted to avoid the just compensation requirement face a Hobson's choice. To be sure of receiving the benefit of *Nollan* heightened scrutiny,[8] they must bring a takings claim, which requires them first to pursue state compensation remedies which may take several years, as well as probably having to apply for one or more development applications that will take several more years and cost many thousands of dollars, before their federal claims are even ripe. If instead the landowner proceeds under the equal protection or due process clauses, it may find that its claims suffer the cursory review that occurred here.

The right of citizens to be free from having their property seized by the sovereign without compensation is worthy of being treated as a fundamental property right, regardless of whether that right is being evaluated under the takings clause, the equal protection clause, or the due process clause. When the same right is being impaired, there is no logical basis to apply different levels of scrutiny.[9] As this Court stated in *Nollan*, it is the purpose of both the equal protection clause and the takings clause "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

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[8] The consequences of applying heightened scrutiny can be significant. In other instances in which a "substantial advancement" test is applied, the burden shifts to the defendant to prove the existence of the substantial relationship, *see Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982), and the improper purpose need only have been the predominant purpose behind the enactment instead of the sole purpose, *see City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 1132 (1986).

[9] It is also questionable whether the deference normally afforded to legislation of general application should be applied to these ordinances, which are aimed solely at Petitioners' properties.

Id. at 834 n.4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). An ordinance that fails to advance legitimate state interests because it is a device to avoid the just compensation requirement should be instantly ripe for review, and should be subject to invalidation regardless of whether the state provides a compensation remedy, at the same level of scrutiny. *See Pennell v. City of San Jose*, 485 U.S. 1, 16 (1988) (Scalia, J., concurring in part and dissenting in part).

III.

THE COURT OF APPEALS ERRED IN AWARDING SUMMARY JUDGMENT ON PETITIONERS' FACIAL DUE PROCESS AND EQUAL PROTECTION CLAIMS BECAUSE THE UNCONTRADICTED EVIDENCE ESTABLISHED THAT AN IMPROPER PURPOSE SUPPORTED THE ZONING ORDINANCES, AND THAT THE PROPER PURPOSE TO RELIEVE TRAFFIC CONGESTION WAS FABRICATED MERELY TO COVER UP THIS IMPROPER PURPOSE.

Even assuming that the rational basis standard applies, the Court of Appeals seriously misinterpreted the governing Supreme Court authority on what establishes the rational nexus between the regulation imposed and the goal sought to be achieved. There is no question that it is difficult for a plaintiff successfully to challenge an ordinance governed by the rational basis standard. That standard, however, should not give governmental entities carte blanche to enact unconstitutional ordinances so long as they can fabricate a rational basis for the

ordinance before a citizen can seek redress in the courts. The Court of Appeals erred by finding the ordinances constitutional because a rational basis could be conceived by defendants, instead of examining the true and arbitrary basis for the ordinances.

The legislation is rationally related if "it is evident from all the considerations *presented to [the legislature]*, and those of which [the Court] may take *judicial notice*, that the question is at least debatable." *Minnesota v. Clover Leaf Creamery Co.* 449 U.S. 456, 464 (1981) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938)). In addition, parties challenging the legislation "may introduce evidence supporting their claim that it is irrational." *Clover Leaf Creamery Co.*, 449 U.S. at 464.

Here, particularly as considered in the instant summary judgment context, the ordinances at issue simply do not meet the rationality standard required under either the due process clause or the equal protection clause. There was not a single fact or consideration presented to the City Council (nor argued to the Court in the Motion for Summary Judgment) from which it could be rationally concluded that devoting the property to surface parking only would relieve future traffic congestion more than devoting the property to a use permitted by the previously existing residential, low-density commercial, or low-density industrial zoning.[10]

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[10] The Court of Appeals fell into the logical trap of comparing traffic congestion that might be generated by the property developed under prior zoning with the property in its *undeveloped state*. The proper comparison is between anticipated traffic congestion created by the property as developed under prior zoning and the property *as developed under the new zoning*.

Neither was this conclusion one of which the Court could or did take judicial notice. There are over 2 1/2 miles of property subject to these ordinances capable of parking thousands of cars. Whether providing parking for those thousands of cars would generate less traffic than the development of single-family residences or small office buildings is certainly not a fact of common knowledge. In fact, the City Planning Commission has found, based on the studies of its professional staff, that parking lots tend to *encourage* private automobile trips. In other words, parking lots act as a magnet for cars.

Thus, in the entire "legislative history" on either of the ordinances at issue, there is not a single fact, study, or hearing from which the City Council could have concluded that surface-parking only zoning would generate less future traffic congestion than the prior zoning. The defendants did not require factual support because the ordinances were enacted for the sole improper purpose of placing the burden on Petitioners of an anticipated public light rail system.[11]

A decision made with no basis is, by definition, arbitrary. *See, e.g., Tooahnippah (Goombi) v. Hickel*, 397 U.S. 598, 610 ("we see no basis for the decision . . . and

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[11] Although no support exists for the purpose of limiting *traffic congestion*, the Planning Commission Chief Examiner found that additional parking was needed on Sepulveda to remedy past City failures to provide *adequate parking*. App. M.1, at M3. (No such finding was made as to Petitioners' Santa Monica property.) However, Petitioners should not bear the burden of remedying a public problem to which they did not contribute: Petitioners own no other property in the area for which this property can be used for parking. In all its papers filed below, the City expressly eschewed reliance on providing *parking* as a legitimate state objective, recognizing that such an objective would immediately create a taking under *Nollan*.

must hold it arbitrary and capricious"). Arbitrary also means abuse of power. *See, e.g., Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1408 (9th Cir.) (deliberate and arbitrary abuse of government power is a due process violation), *cert. denied*, 110 S.Ct. 1317 (1989). The Court of Appeals therefore erred in refusing to take into account Petitioners' evidence of defendants' unconstitutional purpose. Upon consideration of the record, the only possible conclusion is that the City intended to serve the illegitimate state goal of avoiding the just compensation requirement by fabricating the "reduction of traffic congestion" purpose. The true improper purpose is recorded in the Planning Commission findings: "preserving it [Petitioners' land] for a future rapid transit use by imposition of a permanent surface parking zone. . . . [T]o insure that no structures will be constructed on the subject property which will prevent or materially inhibit the acquisition and use of such property for rapid transit or other transportation facilities. . . ." App. L.2, at L10-11.

The City's action was no less arbitrary and irrational on equal protection grounds. Equal protection requires that the court must factually analyze the City's treatment of surrounding parcels to determine whether plaintiffs' property has been "single[d] out . . . for different, less favorable treatment," *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 132-33 (1978), or singled out to remedy prior problems, *Nollan*, 483 U.S. at 835 n.4. In either case, differences in treatment must find a rational basis *in the record*. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985).

The record demonstrates that the subject properties have not contributed at all to any current traffic congestion problem; since the turn of the century Petitioners' land has been used for railroad purposes and for

ancillary uses such as signboards and auto storage on small portions of the margin of the right-of-way. Furthermore, there is no question that Petitioners' properties were singled out; except for an infamous toxic waste dump, their property is the only one in the whole city zoned entirely for surface parking.

The surrounding properties have not been restricted in any similar manner, or even to their current uses.[12] At the same time as Petitioners were restricted to surface parking, their neighbors were allowed to begin intensive development which increased traffic congestion. Petitioners produced evidence that the City has permitted other landowners the same streets to expand the enormous Century City shopping center, and to redevelop their properties to much more intensive uses including several high-rise office towers. All these properties had previously been devoted to less intensive commercial, industrial or office use, and hence *had* historically contributed to the traffic congestion.

Second, the record establishes the irrationality and arbitrariness of the classification. The evidence reveals that the City did not conduct studies from which it could be determined that Petitioners' properties were somehow better suited for preventing traffic congestion.

The Court of Appeals' conclusion that the narrow shape of Petitioners' land justifies the classification scheme lacks factual support. *City of Cleburne*, 473 U.S. at 446, requires not only that the regulated property be different, but also that there be evidence *in the record*

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[12] Therefore, the ordinance cannot be justified on the ground that the City was simply solving the problem a step at a time. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (step-by-step implementation of program).

that would show how that *difference* is relevant to the advancement of the stated goal of relieving traffic congestion.[13] There is no fact, study, hearing, or undisputed common knowledge that development of narrow parcels of land creates more traffic congestion than development of square parcels of land. Moreover, there is no evidence to show how their development could possibly produce more traffic than tearing down neighboring structures and redeveloping those properties for much more intensive uses. Finally, as with the due process claim, Petitioners' evidence of illegitimate governmental purpose must be considered in evaluating the substantiality of the defendants' claim that relief of traffic congestion supports the ordinances.

Because the Third Opinion conflicts with this Court's standards for applying the rational basis test, it is respectfully requested that certiorari be granted.

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[13] The Court of Appeals fell victim to the same kind of fallacy corrected by *City of Cleburne*. In that case, an ordinance required a special use permit and lower density for a home for the mentally retarded, whose neighbors had no such restrictions. The City had proffered the justification of lessening traffic congestion. Acknowledging that mentally retarded people are "indeed different," the Court went on to hold that the "relationship [of that fact to the] asserted goal is so attenuated as to render the distinction arbitrary or irrational." 473 U.S. at 446.

IV.

THE COURT OF APPEALS' INTERPRETATION OF RIPENESS SERIOUSLY CONFLICTS WITH THIS COURT'S STANDARDS AND PREVENTS PROPER REVIEW OF IMPORTANT CONSTITUTIONAL ISSUES.

The Court of Appeals announced a startling new standard for the "final determination requirement" used to determine when an as-applied claim of unconstitutional legislative action is ripe under the due process and equal protection clauses. The Court of Appeals held that a plaintiff challenging the application of a zoning ordinance must apply for a development permit without regard to whether it could be granted, and must also seek amendment of the ordinance itself and of the general plan.[14] This new standard requiring the pursuit of legislative relief conflicts with the rulings of this Court, and of at least one other circuit.

In this case, there is no substantial difference between a facial claim and an as-applied claim of unconstitutionality. The challenged ordinances apply to no properties other than the Southern Pacific rights-of-way at issue. The ordinances allow only one use — surface parking — and there are no waivers, variances, or other administrative avenues of relief legally available. When the ordinances were enacted, they were applied to

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[14] The Court required Petitioners first to seek "availability of relief via conditional use permit, zone change, or General Plan amendment." App. A, at A13, 20; App. C, at C11, 15.

Petitioners and only to Petitioners.[15] The Court of Appeals erred in ruling that Petitioners' as-applied claims were not ripe.

A. Amendment of Ordinance

In California, zoning ordinances and general plan amendments are legislation, not administrative remedies. *Arnel Dev. Co. v. City of Costa Mesa*, 28 Cal.3d 511, 520, 620 P.2d 565, 169 Cal.Rptr. 904 (1980). Until this opinion, no court has ever held that ripeness requires the plaintiff to have already tried to amend, repeal, or replace the challenged legislation prior to being able to seek judicial relief. The final determination requirement rests on the principle that by requiring plaintiffs to avail themselves of "the opportunities provided by the [existing legislation] to obtain administrative relief . . . a mutually acceptable solution might will be reached with regard to individual properties, thereby obviating any need to address the constitutional questions." *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 297 (1981).

Thus, this Court has required plaintiffs making as-applied challenges to land-use ordinances first to seek such *administrative* relief as may be available to them under the provisions of the existing ordinance or legislative system such as variances, waivers, or conditional use permits. *Id. See also Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191

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[15] Why, then, did Petitioners not simply call their claims only facial claims? Because, for these single-property, single-use ordinances, there is no reason why Petitioners should face the "uphill battle" usually attributed to a facial challenge. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987).

(claims cannot be evaluated "until the administrative agency has arrived at a final, definitive position regarding how it will apply the *regulations at issue* to the particular land in question") (emphasis added); *MacDonald, Sommer & Frates v. Count of Yolo*, 477 U.S. 340, 359 (1986) (economic development still possible under ordinance); *accord Landmark Land Co. of Okla., Inc. v. Buchanan*, 874 F.2d 717, 720 (10th Cir. 1989) (requiring finality only on administrative decisions). In contrast to the established requirement of seeking a final determination of existing legislation through *administrative* proceedings, the Court of Appeals determined ripeness by asking whether reasonable development is possible *if the laws were changed.* The obvious result of this stance is that no constitutional challenge would ever be ripe if a court starts to consider the range of development under hypothetical laws. *Tahoe Sierra Preserv. Council v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1345-1346 (9th Cir. 1990) (Kozinski, J. dissenting) (courts could never determine when *legislative* process is final), *cert. denied*, 111 S.Ct. 1404 (1991). It would eviscerate citizens' rights to judicial redress from unconstitutional laws to require as a *jurisdictional* issue that the citizen first seek to change the legislation.[16]

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[16] Indeed to do so in a case seeking relief under 42 U.S.C. § 1983 would be to engraft on that legislation a form of claims requirement as a precondition to relief which Congress could have, but did not include in the legislative scheme.

B. The Futility Exception

The Court of Appeals also refused to honor the futility doctrine developed by this Court, forging instead an inflexible and absolute rule that the zoning ordinance cannot be challenged as applied to Petitioners' property until Petitioners file at least one meaningful development application. The absurdity of this interpretation of the futility exception is self-evident in a case such as this where a meaningful development application cannot be granted as a matter of law.

In the zoning context, administrative relief is usually available through variances, waivers, or conditional use permits, *Horn v. County of Venture*, 24 Cal.3d 605, 613, 596 P.2d 1134, 156 Cal.Rptr. 718 (1979), but here the City has no power to grant such relief to Petitioners. In California, a city has no power to issue a variance, waiver, or other administrative relief that does not conform to its own charter and ordinances. *Broadway, Laguna Vallejo Ass'n v. Board of Permit Appeals*, 66 Cal.2d 767, 773, 780-81, 427 P.2d 810, 59 Cal.Rptr. 146 (1967); *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 520-21, 522 P.2d 12, 113 Cal.Rptr. 836 (1974). The City's charter and ordinances permit it to issue variances only to bring the property into parity with other properties in the same zone and vicinity. Los Angeles City Charter § 98; Los Angeles Municipal Code § 12.27 B-1. There is no use in the same zone and vicinity other than built-to-code surface parking. Therefore, no variance can be given to Petitioners.

Nor is there any use available to Petitioners by conditional use permit. The zoning ordinances here permit a single permanent use — surface parking. They permit

no permanent structures to be built above or below ground. The only conditional use permits available are for temporary ancillary uses.[17] Under Petitioners' uncontroverted evidence, surface parking is not economically viable, and the ancillary uses available would worsen, not help, the economic picture. It makes no sense to require a plaintiff to seek administrative relief that could only worsen its situation, and could never allow development. As Justice Scalia has stated, "I do not understand how such a claim can possibly be avoided by considering it 'premature'. It is inconceivable that we would say judicial challenge must await demonstration that this provision has actually been applied to the detriment of one of the plaintiffs." *Pennell*, 485 U.S. at 16 (Scalia, J. and O'Connor, J. dissenting). Thus, in *Executive 100, Inc. v. Martin County*, 922 F.2d 1536, 1540-41 (11th Cir. 1991), the Eleventh Circuit Court of Appeals held that the plaintiff's facial and as-applied arbitrary and capricious due process claims (improper purpose) and equal protection claims (different treatment) were ripe because "the reapplication requirement of *MacDonald* has no bearing on as-applied arbitrary and capricious due process [or equal protection] claims." Granting Petitioners' writ will provide a much-needed opportunity for this Court to harmonize these conflicts and to reaffirm that a determination of ripeness must be sensitive to the facts of the case, and that when no administrative relief is available, that case is ripe.

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[17] Nonprofit temporary farmers' markets, recycling areas, infrequent helicopter landings, and Christmas tree lots. (Los Angeles Municipal Code § 12.24, 12.27.1.)

CONCLUSION

To resolve these important jurisdictional, constitutional, and ripeness conflicts, Petitioners request that this Court grant this Petition for Writ of Certiorari.

August 23, 1991

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC TRANSPORTATION COMPANY; GEORGE GREGSON; PATRICIA GREGSON MILLINGTON; and EDWIN J. GREGSON, *Plaintiffs-Appellants,* v. CITY OF LOS ANGELES; and CALIFORNIA DEPARTMENT OF TRANSPORTATION, *Defendants-Appellees.*	No. 89-55100 D.C. No. CV 86-0685-RMT OPINION

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding

Argued and Submitted
April 12, 1990—Pasadena, California

Opinion Filed September 7, 1990
Opinion Amended November 9, 1990
Opinion Withdrawn December 4, 1990
Order and Opinion Filed December 4, 1990

Before: Dorothy W. Nelson, William A. Norris and
Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Nelson

SUMMARY

Constitutional Law/Land Use and Zoning

Withdrawing its previously amended opinion and affirming in part, vacating in part and remanding a district court judgment, the court of appeals held that a city's zoning action was not "ripe" for review on a property owner's claims of unconstitutional taking without just compensation.

Appellant Southern Pacific Transportation Company owned real property that at one time was part of a railroad right-of-way. After Southern Pacific abandoned the right-of-way, the Los Angeles City Council rezoned the property to permit surface parking only. Although Southern Pacific opposed the rezoning, it did not forward a development proposal or suggest any alternatives other than continuance of the preexisting zoning. Southern Pacific alleged that the City's rezoning did not reflect the real reasons for the rezoning. However, since the time of the rezoning, Southern Pacific had filed no applications with the City to propose development of the properties. A zoning administrator denied one of Southern Pacific's lessees' request for a minor variance. This denial was also not appealed. The record contained no evidence that Southern Pacific had ever sought compensation for the alleged taking through other channels before filing its federal complaint. Although the rezoning, over which the City of Los Angeles had sole authority, was the act that Southern Pacific claimed caused it direct injury, other agencies named in the complaint were alleged to have conspired with the City in preparation for this action. The district court granted Caltrans' motion to dismiss without leave to amend on eleventh amendment grounds. The district court granted summary adjudication of a single issue in favor of Southern Pacific, ruling that its "facial" constitutional claims were ripe for federal adjudication. That same order granted summary judgment in favor of appellees on all "as-applied" constitu-

tional claims, ruling that the claims were unripe because appellants never filed a meaningful development application. On a motion for reconsideration, the district court entered summary judgment in favor of appellees on all claims. That court found that all just compensation claims were unripe because even the facial claims required appellants to seek compensation before filing suit. The district court also found that there were no genuine issues of material fact concerning the due process and equal protection claims.

[1] Constitutional challenges to local land use regulations are not considered by federal courts until the posture of the challenges makes them "ripe" for federal adjudication. Ripeness is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed. [2] The court found that Southern Pacific's claims were unripe for federal adjudication. In its allegation of an as-applied taking, Southern Pacific had not shown that it had obtained a final and authoritative determination of the type and intensity of development legally permitted on its property. Second, Southern Pacific did not show that it had used an adequate state procedure and was denied just compensation. [3] In applying the "final determination" requirement, courts have emphasized that local decisionmakers must be given an opportunity to review at least one reasonable development proposal before an as-applied challenge to a land use regulation will be considered ripe. [4] In this case, Southern Pacific failed to satisfy the meaningful application requirement. Although it opposed the rezoning of the subject propery, it gave no indication at that time of how it might intend to develop the property if permitted to do so. It filed no meaningful applications for development of its property, for variances, or for any other form of relief before filing its federal complaint. Since no meaningful application was made, there was no final determination concerning allowable development and the district court properly concluded that Southern Pacific's as-applied claim was not ripe for federal adjudication. [5] The futility exception did not alter

Southern Pacific's obligation to file one meaningful development proposal. [6] Southern Pacific could not claim a taking without just compensation because they failed to seek compensation through any reasonable state procedure available. [7] A procedure for seeking just compensation existed when the alleged taking took place. Southern Pacific failed to seek this compensation before filing its federal complaint. This failure was fatal. However, even if a taking had taken place, no claim that the just compensation clause was violated would be ripe. [8] The court agreed that Southern Pacific's facial challenge to the City's action was not ripe for review because Southern Pacific had failed to satisfy the just compensation ripeness requirement. [9] The court concluded that a claim alleging that mere enactment of a statute effects an unconstitutional taking was unripe unless and until it was known what, if any, compensation was available. [10] Because appellants did not seek compensation through state procedures, this determination could not be made. Accordingly, the zoning ordinance was not ripe for review. [11] Appellants' as-applied due process and equal protection claims were as premature as the just compensation claims, because the "final determination" requirement, with the concomitant requirement that a meaningful development application be submitted, governs ripeness of these claims as well. [12] The zoning classification did not on its face violate the due process clause. Southern Pacific did not make sufficient factual allegations suggesting that zoning its property for parking was irrational. [13] Southern Pacific's facial equal protection claim also failed. Because Southern Pacific did not allege that the regulation discriminated against a suspect class, the standard of review was highly deferential. [14] Because appellants' takings and as-applied due process and equal protection challenges were unripe, the district court erred in granting summary judgment as to these claims. The correct disposition should have been dismissal, not summary judgment. [15] Appellants' claims against Caltrans, a state

agency, were prohibited by the eleventh amendment even though they sought prospective relief.

COUNSEL

Vicki E. Land, Brown, Wingield & Canzoneri, Inc., Los Angeles, California, for the plaintiffs-appellants.

Patricia V. Tubert, Deputy City Attorney, Los Angeles, California, for the defendant-appellee.

Christopher Hiddleson, Los Angeles, California, for the defendant-appellee, California Department of Transportation.

ORDER

The mandate of this court, issued October 1, 1990, is recalled.

The amended opinion filed November 9, 1990 is hereby withdrawn and the attached opinion is filed in its stead.

OPINION

NELSON, Circuit Judge:

The mandate of this court, issued October 1, 1990, is recalled.

The amended opinion filed November 9, 1990 is hereby withdrawn and the attached opinion is filed in its stead.

OPINION

NELSON, Circuit Judge:

OVERVIEW

Appellants own real property in the City of Los Angeles which once was dedicated as a railroad right-of-way. The right-of-way was formally abandoned, and the city subsequently applied a zoning designation to the property which indicates that it may be used for surface parking only. Appellants complain that by this action the city, in conspiracy with other public agencies, took their property without just compensation and violated their rights to due process and equal protection.

The district court dismissed the complaint as to defendant California Department of Transportation (Caltrans) on eleventh amendment grounds. The court then entered summary judgment in favor of all other defendants, finding that the just compensation claims were not "ripe" for federal adjudication and that no genuine issue of material fact remained regarding the due process and equal protection claims.

The district court was correct in concluding that plaintiffs' just compensation claims were unripe. The correct disposition of unripe claims is dismissal. Therefore, as to plaintiffs' as-applied takings, equal protection and due process claims and plaintiffs' facial takings claim, we vacate the judgment and remand with instructions to dismiss for lack of jurisdiction. We affirm the judgment as to plaintiffs' facial due process and equal protection claims.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants own real property in the City of Los Angeles which once consisted of part of a railroad right-of-way. The former right-of-way was laid out in two long, narrow strips;

one parallels Santa Monica Boulevard from the Beverly Hills city limit west to Sepulveda Boulevard, and the other parallels Sepulveda Boulevard from Santa Monica Boulevard south to Pico Boulevard.[1] Each of these strips is broken into numerous segments by cross streets. The strip which parallels Santa Monica Boulevard averages 50 feet in width, while the Sepulveda strip is 40 feet wide.

In the early 1980s, the railroad right-of-way bore a variety of residential, commercial, and industrial zoning designations, generally consistent with adjacent zoning in the neighborhoods through which the railroad ran. These designations had little practical effect as long as the rails were in use, since the property could not be physically developed anyway.

By 1983, rail traffic on these routes had become very light, and Southern Pacific petitioned the Interstate Commerce Commission (ICC) for permission to abandon the right-of-way.

In September 1983, the Los Angeles City Council responded to the petition for abandonment by initiating proceedings to rezone the properties to the [Q]P-1 zone, which permits surface parking only. The proposal was sent to the City Planning Department, and hearings were held. Appellants opposed the rezoning in those hearings, but the record does not indicate that they forwarded a development proposal or suggested any alternatives other than continuance of the preexisting zoning.

On October 4, 1985, the City Council adopted ordinances implementing the rezoning. The Council made written findings which indicate that the reasons for the rezoning included concern for the unique shape and configuration of the properties, a lack of adequate parking facilities in the vicinity of the properties, and continuity with existing uses on the proper-

[1]Appellants own some, but not all, of this former right-of-way.

ties, some of which had been converted to parking use after abandonment of the railroad.

Appellants assert that these findings do not reflect the City's real reasons for the rezoning. They claim that the City and the other public agency appellees were exploring the possibility of acquiring the subject properties for transportation projects, and that the downzoning was intended to depress the value of the properties and prevent the construction of buildings so as to reduce the cost of acquisition. The record does indicate that various public agencies had been considering transportation improvements along the Santa Monica Boulevard corridor for years, and that these agencies were concerned about losing the opportunity to acquire this property if it were developed. The record also reflects that both the City Planning Department hearing examiner who considered the Santa Monica Boulevard zone change and the City Planning Commission cited preservation of the land for future transportation uses as one reason for the downzoning, although the City Council did not include this in its final list of findings. There is little evidence in the record that these same transportation concerns ever applied to the Sepulveda properties.

Since the time of the rezoning, appellants have filed no applications with the City to propose development of the properties. One of their lessees did file an application for a minor variance, seeking permission to operate a surface parking lot on the property enclosed only by a fence, rather than the concrete block wall required by the zoning code. This request was denied by a zoning administrator in the City Department of Building and Safety. The record does not indicate that this denial was appealed.

The record contains no evidence that appellants had ever sought compensation for the alleged taking through other channels before filing this federal complaint.

Appellants filed this action in the district court on January 29, 1986. The complaint contained three counts: Count One alleged violation of appellants' federal constitutional rights to just compensation, due process, and equal protection under the fifth and fourteenth amendments and 42 U.S.C. section 1983, Count Two was a pendent state claim under the California Constitution, and Count Three alleged violations of the California Environmental Quality Act (CEQA). In addition to the City of Los Angeles, the complaint named the County of Los Angeles, the Los Angeles County Transportation Commission (LACTC), and Caltrans as defendants. Although the rezoning, over which the City of Los Angeles had sole authority, was the act which appellants claimed had caused them direct injury, the other agencies were alleged to have conspired with the City in preparation for this action.

The district court granted an early motion by Caltrans to dismiss without leave to amend on eleventh amendment grounds. This appeal includes an appeal of Caltrans' dismissal. The district court also dismissed the CEQA claim as to all defendants and this has not been appealed.

On May 20, 1988, the district court granted summary adjudication of a single issue in favor of plaintiffs, ruling that their "facial" constitutional claims were ripe for federal adjudication. The same order granted summary judgment in favor of defendants on all "as-applied" constitutional claims, ruling that the claims were unripe because plaintiffs had never filed a meaningful development application.

On December 14, 1988, the district court entered an order granting a motion for reconsideration of its May 20 order and subsequently entered summary judgment in favor of appellees on all claims.[2] Specifically the court found that all just

[2]In their opening brief, appellants argue that because the memorandum which accompanied the judgment did not explicitly discuss the pendent state claim, there is confusion as to whether the judgment disposed of that

compensation claims were unripe because even the facial claims required plaintiffs to seek compensation before filing suit. The court also found that there were no genuine issues of material fact regarding the due process and equal protection claims.

The notice of appeal was timely filed on January 10, 1989.[3]

DISCUSSION

I. Standard of Review

A grant of summary judgment is reviewed de novo to determine, viewing the evidence in the light most favorable to the nonmoving party, whether there existed any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

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claim. The notice of appeal indicates that appellants initially considered the judgment to be final and dispositive of all claims.

We agree with the appellants' first inclination. The judgment order of December 14, 1988 states that "defendants ... are entitled to summary judgment.... plaintiffs shall have and recover nothing against defendants." This judgment clearly disposes of all claims brought by appellants against defendants including their pendent state claim.

On appeal appellants never discussed the merits of their pendent state claim. As a general rule, matters that are not specifically and distinctly raised and argued in appellants' opening brief are not considered by this court. *International Union of Bricklayers Local 20 v. Martin Jaska Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985). In the instant case, because the merits have not been explored by either party and appellees were never notified that the merits would be an issue on appeal, we will follow the general rule and decline to review the portion of the district court's order granting summary judgment on the state pendent claim.

[3]During the pendency of this appeal, appellants settled with appellee LACTC and the County of Los Angeles.

Ripeness for federal adjudication is a question of law reviewed de novo. *Hoehne v. County of San Benito,* 870 F.2d 529, 531 (9th Cir. 1989).

II. Ripeness for Federal Adjudication

A. Ripeness Defined

[1] Constitutional challenges to local land use regulations are not considered by federal courts until the posture of the challenges makes them "ripe" for federal adjudication. Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed. *Shelter Creek Dev. Corp. v. City of Oxnard,* 838 F.2d 375, 377 (9th Cir.), *cert. denied,* 109 S. Ct. 134 (1988). This deficiency may be raised sua sponte if not raised by the parties. *Id.*

B. Ripeness Under the Just Compensation Clause

1. As-applied Claim

[2] Ripeness of an as-applied challenge (i.e., a claim that as applied to a particular property a statute effects an uncompensated taking) involves two independent prerequisistes. First, since a court cannot determine whether a taking has occurred unless the extent of permissible development is clear, plaintiffs alleging an as-applied taking must show that they have obtained "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340, 348 (1986). Second, since the Constitution does not prohibit takings, but only takings without just compensation, "if a State provides an adequate procedure for seeking just compensation," plaintiffs may not bring as-applied claims to federal court until they have "used the procedure and been denied just compensation."

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 (1985). For the reasons which follow, we find that Southern Pacific and the other plaintiffs have met neither of these requirements and that the district court was correct in concluding that their claims are unripe for federal adjudication.[4]

a. Final Determination Regarding Allowable Development

(i). In General

[3] In applying the "final determination" requirement, courts have emphasized that local decision-makers must be given an opportunity to review at least one reasonable development proposal before an as-applied challenge to a land use regulation will be considered ripe. *E.g., Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir.), *modified*, 830 F.2d 968 (1987), *cert. denied*, 484 U.S. 1043 (1988). The development proposal must be "meaningful," which means that rejection of "exceedingly grandiose development plans" is insufficient to show that the local agency does not intend to allow reasonable development. *MacDonald*, 477 U.S. at 353 n.9. By the same token, other requests may be so minor that denial does not give a fair indication of how a comprehensive development plan would be handled.

[4]Exhaustion of state remedies is ordinarily not required for actions brought pursuant to 42 U.S.C. § 1983. *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982). However, the Supreme Court has held that "[t]he question whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable," *Hamilton Bank*, 473 U.S. at 192, and that ripeness of claims like this one may therefore be predicated on obtaining a final determination regarding permitted uses. *Id.* at 193. The court also held that the language of the fifth amendment requires property owners to utilize procedures for obtaining just compensation before alleging a taking in a section 1983 action. *Id.* at 194 n.13.

The meaningful application requirement also mandates that claimants pursue the application thoroughly and not abandon it at an early stage. *See Kinzli,* 818 F.2d at 1455. Those who have not followed available routes of appeal cannot claim to have obtained a "final" decision, particularly if they have foregone an opportunity to bring their proposal before a decisionmaking body with broad authority to grant different forms of relief or to make policy decisions which might abate the alleged taking.[5]

The meaningful application requirement is not waived when a zoning ordinance only appears not to permit a reasonable economic return on a piece of property. In such cases, property owners are required to seek a reasonable return by applying for such variances as would provide it. *Hamilton Bank,* 473 U.S. at 172-73; *Kinzli,* 818 F.2d at 1454. The term "variance" is not definitive or talismanic; if other types of permits or actions are available and could provide similar relief, they must be sought. *See Hoehne,* 870 F.2d at 533-35 (discussing availability of relief via conditional use permit, zone change, or General Plan amendment).[6]

[4] In this case, appellants have failed to satisfy the mean-

[5]Courts have imposed the meaningful application requirement even in instances where a regulation appeared on its face to be highly restrictive. One reason for this is that local agencies have wide authority to grant relief which might keep the regulation from denying the owner a reasonable economic return. "The local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other." *MacDonald,* 477 U.S. at 350 (discussing *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104 (1978)). This flexibility is obviously useless if property owners abandon their applications after rejection by civil servants with narrow authority and before seeking relief from a body with broader powers.

[6]The *Hoehne* court found that the Hoehnes were excused from seeking these types of relief, but only because the facts of that case fell within the "futility exception" discussed *infra.*

ingful application requirement. Although they opposed the rezoning of the subject properties between 1983 and 1985, they gave no indication at that time of how they might intend to develop the property if permitted to do so. They filed no meaningful applications for development of the property, for variances, or for any other form of relief before filing this federal complaint.[7] To address this claim in this posture, federal courts would be required to guess what possible proposals appellants might have filed with the City, and how the City might have responded to these imaginary applications. It is precisely this type of speculation that the ripeness doctrine is intended to avoid. *Kinzli*, 818 F.2d at 1454. Since no meaningful application has been made, there has been no final determination regarding allowable development of these properties and the district court properly concluded that appellants' as-applied claim is not ripe for federal adjudication.

(ii). The Futility Exception

[5] Appellants contend that they should be excused from filing a meaningful application in this case, because the City's action in downzoning the properties makes it clear that any such application would be futile. While it is true that something called a "futility exception" exists, this exception serves only to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved. The futility exception does not alter an owner's

[7]Appellants point to the minor variance denied to one of their lessees as evidence of a previous application, but that request was not meaningful. Refusal to permit erection of a fence rather than a wall around a parking lot gives no indication of how the City would respond to a major development application. The decision was based on specific safety and aesthetic concerns which would not pertain to other proposals. It was also the decision of a zoning administrator with limited authority to grant relief, and the available appeal apparently was not taken. *See id.* at 96.

obligation to file one meaningful development proposal. *Kinzli*, 818 F.2d at 1455.

Appellants rely heavily on *Hoehne*, but their reliance is misplaced. In *Hoehne*, a property owner had made an application to divide a 60-acre parcel of land into four lots, with one home to be placed on each. The local board of supervisors denied the subdivision request, and immediately rezoned the property to a zone having a minimum lot size of 40 acres. The court held that this constituted a final determination of the permitted use of the Hoehnes' land, and that the Hoehnes were not required to apply for further variances or other types of permits before coming to court. 870 F.2d at 535. The *Hoehne* court emphasized that the meaningful application requirement had already been satisfied by the subdivision request; the only thing excused by invocation of the futility exception was "[r]e-application and re-submission." *Id.*

Appellants are not helped by the futility exception because, unlike the Hoehnes, they have never filed a meaningful application.

b. Denial of Just Compensation

[6] The second prong of the ripeness inquiry provides an additional reason why the as-applied claims are unripe. Appellants cannot claim a taking without just compensation unless they have sought compensation through any reasonable procedure provided by the state. *Hamilton Bank*, 473 U.S. at 194-97. To determine whether such procedures were available, courts look to the time when the alleged taking occurred. *Id.* at 194; *Hoehne*, 870 F.2d at 534. Appellants consider this important because the alleged taking in this case took place before the U.S. Supreme Court ruled in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) that money damages must be available as a remedy when it is determined that a land use regulation has worked a taking. Prior to *First English*, the gen-

eral rule in California was that landowners could seek only declaratory relief or mandamus in such cases, not damages. *Agins v. Tiburon*, 24 Cal. 3d 266, 275-77, 598 P.2d 29-31, 57 Cal. Rptr. 376-78 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980). Appellants claim that under *Agins*, there was no procedure available by which they might have sought compensation before resorting to federal court.

This claim is incorrect because the complaint filed in this action alleges unreasonable precondemnation activity, a cause of action for which money damages were available in California both before and after *Agins*. The essence of Southern Pacific's complaint is that "[t]he City Council's act of down-zoning the Subject Properties was unreasonable conduct taken by the City in anticipation of the condemnation of Plaintiffs' properties." Appellants assert that appellees sought to depress the value of these properties so that they could be acquired through eminent domain more cheaply than would otherwise have been possible.

The California Supreme Court ruled in *Klopping v. City of Whittier* that such wrongs were compensable. 8 Cal. 3d 39, 52, 500 P.2d 1335, 104 Cal. Rptr. 11 (1972). *Agins* did not eliminate this cause of action. In *Toso v. City of Santa Barbara*, 101 Cal. App. 3d 934, 162 Cal. Rptr. 210 (1980), the California Court of Appeal held that even after *Agins*, "inequitable zoning actions by a public agency undertaken as a prelude to public acquisition may result in an action for damages." *Id.* at 952.[8]

[8]Even if it were unclear that the *Klopping* cause of action had survived *Agins*, appellants would have been required to test this question by attempting to secure compensation in the state courts. Claimants are required to seek compensation in state courts before filing federal complaints even when state remedies are uncertain and undeveloped. *Austin v. City and County of Honolulu*, 840 F.2d 680-81 (9th Cir.), *cert. denied*, 109 S. Ct. 136 (1988).

[7] Under *Klopping* and *Toso*, a procedure for seeking just compensation existed when the alleged taking took place. Appellants failed to seek this compensation before filing their federal complaint. The district court properly concluded that this failure was fatal. Even if a taking had taken place, no claim that the just compensation clause had been violated would be ripe.

2. Facial claim

[8] Appellants also have brought a facial challenge to the City's action, in other words, a claim that the mere adoption of the ordinances constitutes an uncompensated taking. The district court found, and we agree, that this claim also is unripe for federal adjudication because plaintiffs have failed to satisfy the just compensation ripeness requirement.

[9] *Hamilton Bank* did not address the issue whether the ripeness hurdle, which stands in the way of as-applied challenges, also obstructs their facial counterparts. Indeed, some courts have found that it does not. *See e.g., Crow-New Jersey, 32 Ltd. v. Township of Clinton*, 718 F.Supp. 378, 382-83 (D.N.J. 1989) (holding facial challenges immune to either of *Hamilton Bank*'s ripeness tests). Moreover, the Supreme Court often has reached the merits of facial attacks without regard for ripeness considerations. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n. Inc.*, 452 U.S. 264 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980). In light of the ample confusion in this area, we take this opportunity to discuss the relevance of *Hamilton Bank*'s ripeness requirements to facial takings challenges. We conclude that a claim alleging that mere enactment of a statute effects an unconstitutional taking is unripe unless and until it is known what, if any, compensation is available.[9]

[9]In light of the district court's ruling, we need not decide whether *Hamilton Bank*'s first ripeness requirement might also apply to facial chal-

What distinguishes the present case from the above-mentioned Supreme Court precedents is its posture. *Agins, Hodel, Loretto* and *Keystone* all had to do exclusively with the question whether the regulation amounted to a taking. Although the Court reached the merits in each of them, that was only half the inquiry. The question whether just compensation was available, necessary to determine whether the alleged taking was unconstitutional, was simply not reached because it was unnecessary. In *Agins,* the state court denied plaintiffs' takings claim, holding that there simply had been no taking, and therefore no need for compensation. That was the sole question addressed by the Supreme Court. *Agins,* 447 U.S. at 260. In *Hodel,* the Court specifically noted that "an alleged taking is not unconstitutional unless just compensation is unavailable." *Hodel,* 452 U.S. at 297 n.40. In *Loretto,* the sole issue was whether the physical occupation of the property constituted a "taking" for which "just compensation is due." The Court's decision to reverse the state court rested on the finding that a taking had indeed occurred. The Court went on to say: "The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand." *Loretto,* 458 U.S. at 441.[10]

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lenges. The Supreme Court has not addressed this question directly. In a number of instances, the Court has noted that certain facial challenges are impossible to evaluate absent some factual information regarding how the statute will be applied. This could lead to a ruling on the merits that, facially, the statute's "mere enactment" does not effect a taking, *see e.g., Keystone Butiminous Coal Ass'n. v. DeBenedictis,* 480 U.S. 470, 495-96 (1987), or to a jurisdictional determination that the issue is not ripe for resolution, *see e.g., Pennell v. San Jose,* 485 U.S. 1, 10 (1987). The point appears to be that some regulations, by their very nature, are just not subject to facial attack on takings grounds. Prior to their application, in other words, the attacks are simply premature.

[10]As Justice Blackmun noted in dissent: "Happily, the Court leaves open the question whether [the statute] provides . . . sufficient compensation." *Id.* at 456 n.12 (Blackmun, J., dissenting).

[10] The question we face here is whether the zoning ordinance effected an *unconstitutional, uncompensated* taking. To make this determination, we must first decide whether compensation is available. If such be the case, it would be "unnecessary" to resolve the taking claim for "[w]here the action . . . is a taking . . . the availability of a suit for compensation . . . will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment." *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 697 n.18 (1949); *see also Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 94 n.39 (1978). Because appellants have not sought compensation through state procedures, *see supra*, this determination cannot be made. Accordingly, the ordinance is not appropriate for review — it is, as it were, "unripe."

First Lutheran Church v. Los Angeles, 482 U.S. 304 (1987), one of the few cases to reach the second, remedial question, provides support for the proposition that even facial challenges must overcome the just compensation ripeness hurdle.[11] The case involved a *facial* takings attack on a local ordinance. The state court had held that, regardless of whether a taking had occurred, no compensation would be available. In reversing, the Supreme Court explicitly noted that plaintiffs had clearly met *Hamilton Bank*'s second ripeness requirement (which, it follows, applied), for the State

[11]This is not to say that all facial challenges to zoning restrictions will be subject to this hurdle. In some instances, as we have seen, it will not be an issue because the court is simply considering whether a taking has occurred, not whether it is a taking "without just compensation." In others, no compensation would be sufficient to cure the constitutional infirmity. Some harms are "impermissible even if the government is willing to pay for them." *Hamilton Bank*, 473 U.S. at 202 (Stevens, J., concurring). "For example, even if the State is willing to compensate me, it has no right to appropriate my property because it does not agree with my political or religious views." *Id.* at 202 n.1. Likewise, takings that involve violations of the Equal Protection or Due Process clauses will be found unconstitutional notwithstanding any available compensation, for neither clause contains a remedial provision.

had ruled that plaintiffs could not enjoy its compensatory procedures. *Id.* at 312 & n.6.

In short, in the absence of knowledge regarding the availability of compensation, appellants' challenges to the constitutionality of the ordinance are simply unripe — whether they be dressed in their "as-applied" or "facial" garb.

C. Other Federal Claims

[11] In addition to their just compensation claims, appellants allege that their rights to substantive due process and equal protection were violated by the City's actions. All as-applied challenges to regulatory takings, whether based on the just compensation clause, the due process clause or the equal protection clause, possess the same ripeness requirement: a final determination by the relevant governmental body. *See Pennell,* 485 U.S. 11 n.5; *Sinaloa Lake Owners Ass'n v. City of Simi Valley,* 882 F.2d 1398, 1404 (9th Cir. 1989), *cert. denied,* 110 S. Ct. 1317 (1990); *Herrington v. County of Sonoma,* 857 F.2d 567, 569 (9th Cir. 1988), *cert denied,* 109 S. Ct. 1557 (1989). Thus, appellants' as-applied due process and equal protection claims are as premature as the just compensation claims, because the "final determination" requirement, with the concomitant requirement that a meaningful development application be submitted, governs ripeness of these claims as well. *Hoehne,* 870 F.2d at 532; *Shelter Creek,* 838 F.2d at 379; *Kinzli,* 818 F.2d at 1455-56.

Appellants also contend that the mere adoption of the ordinance violated the due process and equal protection clauses. Neither the finality nor the just compensation ripeness requirement apply to such facial challenges. *See Pennell,* 485 U.S. at 11; *Eide v. Sarasota County,* 908 F.2d 716 (11th Cir. 1990).

[12] Turning first to the claim that the City has acted arbitrarily in violation of the due process clause, we agree with the

district court that appellants have presented us with no genuine issue of material fact. The standard for determining that a zoning ordinance fails to comport with substantive due process is demanding. As stated by the Supreme Court:

> [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955). The prevention of traffic congestion is reason enough to justify the targetted ordinance. Appellants have not made sufficient factual allegations suggesting that zoning their property for parking was irrational. Accordingly, the zoning classification does not on its face violate the due process clause.

[13] Appellants' facial equal protection claim also must fail. Because Southern Pacific does not allege that the regulation discriminates against a suspect class, the standard of review is highly deferential. "[A]ppellees need only show that the classification scheme is 'rationally related to a legitimate state interest.' " *Pennell*, 485 U.S. at 14 (quoting *New Orleans v. Duke*, 427 U.S. 297, 303 (1976)). The City has set forth plausible reasons for its zoning policy and for its decision to focus on narrow strips of land such as appellants'. Presumably, the zoning might have been more equitable, perhaps even more logical, but on its face, the ordinance displays no outward sign of irrationality.

D. Disposition of Unripe Claims

[14] Because appellants' takings and as-applied due process and equal protection challenges are unripe, the district court erred in granting summary judgement as to these claims. Ripeness is a threshold jurisdictional question; when claims are unripe the correct disposition is dismissal, not summary

judgment. *Lai v. City and County of Honolulu*, 841 F.2d 301, 303 (9th Cir.), *cert. denied*, 109 S. Ct. 560 (1988); *Shelter Creek*, 838 F.2d at 380; *Kinzli*, 818 F.2d at 1457.

III. Dismissal of Caltrans

The district court dismissed the complaint as to defendant Caltrans, finding that as a state agency it was immune from suit under the eleventh amendment. Appellants argue that because they seek declaratory and injunctive relief, the eleventh amendment does not prohibit suing a state agency.

[15] Appellants are correct that "the Eleventh Amendment does not bar actions against state officers in their official capacities if the plaintiffs seek only a declaratory judgment or injunctive relief." *Chaloux v. Killeen*, 886 F.2d 247, 252 (9th Cir. 1989) (internal quotations omitted). However, in this case, appellants did not name state officials of Caltrans in their suit but instead sued Caltrans directly. "[I]n the absence of consent a suit in which the State or one of its agencies or department is named as the defendant is proscribed by the Eleventh Amendment. This jurisdictional bar applies regardless of the nature of the relief sought."[12] *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (citations omitted). Therefore, appellants' claims against Caltrans, undisputably a state agency, are prohibited by the eleventh amendment even though they sought prospective relief.

CONCLUSION

For the foregoing reasons, the district court's judgment as to plaintiffs' facial due process and equal protection claims is affirmed. The district court's judgment as to all other claims

[12]The state has not consented to be sued under § 1983 and Congress did not override states' sovereign immunity when it enacted § 1983. *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304, 2309 (1989).

is vacated and remanded with instructions to dismiss without prejudice for lack of jurisdiction.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

THE MANDATE SHALL ISSUE FORTHWITH.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC TRANSPORTATION COMPANY; GEORGE GREGSON; PATRICIA GREGSON MILLINGTON; and EDWIN J. GREGSON,
Plaintiffs-Appellants,

v.

CITY OF LOS ANGELES; and CALIFORNIA DEPARTMENT OF TRANSPORTATION,
Defendants-Appellees.

No. 89-55100

D.C. No. CV 86-0685-RMT

AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding

Argued and Submitted
April 12, 1990—Pasadena, California

Filed September 7, 1990
Amended November 9, 1990

Before: Dorothy W. Nelson, William A. Norris and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Nelson

SUMMARY

Constitutional Law/Land Use and Zoning

Affirming in part, vacating in part and remanding a district court judgment, the court of appeals held that a city's zoning

action was not "ripe" for review on a property owner's claims of unconstitutional taking without just compensation.

Appellant Southern Pacific Transportation Company owned real property that at one time was part of a railroad right-of-way. After Southern Pacific abandoned the right-of-way, the Los Angeles City Council rezoned the property to permit surface parking only. Although Southern Pacific opposed the rezoning, they did not forward a development proposal or suggest any alternatives other than continuance of the preexisting zoning. Southern Pacific alleged that the city's rezoning did not reflect the real reasons for the rezoning. However, since the time of the rezoning, Southern Pacific has filed no applications with the City to propose development of the properties. A zoning administrator denied one of Southern Pacific's lessees' request for a minor variance. This denial was also not appealed. The record contained no evidence that Southern Pacific had ever sought compensation for the alleged taking through other channels before filing its federal complaint. Although the rezoning, over which the City of Los Angeles had sole authority, was the act that Southern Pacific claimed caused them direct injury, other agencies named in the complaint were alleged to have conspired with the City in preparation for this action. The district court granted Caltrans' motion to dismiss without leave to amend on eleventh amendment grounds. The district court granted summary adjudication of a single issue in favor of Southern Pacific, ruling that their "facial" constitutional claims were ripe for federal adjudication. That same order granted summary judgment in favor of appellees on all "as-applied" constitutional claims, ruling that the claims were unripe because appellants never filed a meaningful development application. On a motion for reconsideration, the district court entered summary judgment in favor of appellees on all claims. That court found that all just compensation claims were unripe because even the facial claims required appellants to seek compensation before filing suit. The district court also found

that there were no genuine issues of material fact concerning the due process and equal protection claims.

[1] Constitutional challenges to local land use regulations are not considered by federal courts until the posture of the challenges makes them "ripe" for federal adjudication. Ripeness is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed. [2] The court found that Southern Pacific's claims were unripe for federal adjudication. In its allegation of an as-applied taking, Southern Pacific had not shown that it had obtained a final and authoritative determination of the type and intensity of development legally permitted on its property. Second, Southern Pacific did not show that it had used an adequate state procedure and was denied just compensation. [3] In applying the "final determination" requirement, courts have emphasized that local decisionmakers must be given an opportunity to review at least one reasonable development proposal before an as-applied challenge to a land use regulation will be considered ripe. [4] In this case, Southern Pacific failed to satisfy the meaningful application requirement. Although it opposed the rezoning of the subject propery, it gave no indication at that time of how they might intend to develop the property if permitted to do so. It filed no meaningful applications for development of its property, for variances, or for any other form of relief before filing its federal complaint. Since no meaningful application was made, there was no final determination concerning allowable development and the district court properly concluded that Southern Pacific's as-applied claim was not ripe for federal adjudication. [5] The futility exception did not alter Southern Pacific's obligation to file one meaningful development proposal. [6] Southern Pacific could not claim a taking without just compensation because they failed to seek compensation through any reasonable state procedure available. [7] A procedure for seeking just compensation existed when the alleged taking took place. Southern Pacific failed to seek this compensation before filing their federal complaint. This

failure was fatal. However, even if a taking had taken place, no claim that the just compensation clause was violated would be ripe. [8] The court agreed that Southern Pacific's facial challenge to the City's action was not ripe for review because Southern Pacific had failed to satisfy the just compensation ripeness requirement. [9] The court concluded that a claim alleging that mere enactment of a statute effects an unconstitutional taking was unripe unless and until it was known what, if any, compensation was available. [10] Because appellants did not seek compensation through state procedures, this determination could not be made. Accordingly, the zoning ordinance was not ripe for review. [11] Appellant's as-applied due process and equal protection claims were as premature as the just compensation claims, because the "final determination" requirements, with the concomitant requirement that a meaningful development application be submitted, governs ripeness of these claims as well. [12] The zoning classification did not on its face violate the due process clause. Southern Pacific did not make sufficient factual allegations suggesting that zoning their property for parking was irrational. [13] Southern Pacific's facial equal protection claim also failed. Because Southern Pacific did not allege that the regulation discriminated against a suspect class, the standard of review was highly deferential. [14] Because appellant's takings and as-applied due process and equal protection challenges were unripe, the district court erred in granting summary judgment as to these claims. The correct disposition should have been dismissal, not summary judgment. [15] Appellant's claims against Caltrans, a state agency, were prohibited by the eleventh amendment even though they sought prospective relief.

COUNSEL

Vicki E. Land, Brown, Wingield & Canzoneri, Inc., Los Angeles, California, for the plaintiffs-appellants.

Patricia V. Tubert, Deputy City Attorney, Los Angeles, California, for the defendant-appellee.

Christopher Hiddleson, Los Angeles, California, for the defendant-appellee, California Department of Transportation.

OPINION

NELSON, Circuit Judge:

OVERVIEW

Appellants own real property in the City of Los Angeles which once was dedicated as a railroad right-of-way. The right-of-way was formally abandoned, and the city subsequently applied a zoning designation to the property which indicates that it may be used for surface parking only. Appellants complain that by this action the city, in conspiracy with other public agencies, took their property without just compensation and violated their rights to due process and equal protection.

The district court dismissed the complaint as to defendant California Department of Transportation (Caltrans) on eleventh amendment grounds. The court then entered summary judgment in favor of all other defendants, finding that the just compensation claims were not "ripe" for federal adjudication and that no genuine issue of material fact remained regarding the due process and equal protection claims.

The district court was correct in concluding that plaintiffs' just compensation claims were unripe. The correct disposition of unripe claims is dismissal. Therefore, as to plaintiffs' as-applied takings, equal protection and due process claims and plaintiffs' facial takings claim, we vacate the judgment

and remand with instructions to dismiss for lack of jurisdiction. We affirm the judgment as to plaintiffs' facial due process and equal protection claims.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants own real property in the City of Los Angeles which once consisted of part of a railroad right-of-way. The former right-of-way was laid out in two long, narrow strips; one parallels Santa Monica Boulevard from the Beverly Hills city limit west to Sepulveda Boulevard, and the other parallels Sepulveda Boulevard from Santa Monica Boulevard south to Pico Boulevard.[1] Each of these strips is broken into numerous segments by cross streets. The strip which parallels Santa Monica Boulevard averages 50 feet in width, while the Sepulveda strip is 40 feet wide.

In the early 1980s, the railroad right-of-way bore a variety of residential, commercial, and industrial zoning designations, generally consistent with adjacent zoning in the neighborhoods through which the railroad ran. These designations had little practical effect as long as the rails were in use, since the property could not be physically developed anyway.

By 1983, rail traffic on these routes had become very light, and Southern Pacific petitioned the Interstate Commerce Commission (ICC) for permission to abandon the right-of-way.

In September 1983, the Los Angeles City Council responded to the petition for abandonment by initiating proceedings to rezone the properties to the [Q]P-1 zone, which permits surface parking only. The proposal was sent to the City Planning Department, and hearings were held. Appellants opposed the rezoning in those hearings, but the record does not indicate that they forwarded a development pro-

[1]Appellants own some, but not all, of this former right-of-way.

posal or suggested any alternatives other than continuance of the preexisting zoning.

On October 4, 1985, the City Council adopted ordinances implementing the rezoning. The Council made written findings which indicate that the reasons for the rezoning included concern for the unique shape and configuration of the properties, a lack of adequate parking facilities in the vicinity of the properties, and continuity with existing uses on the properties, some of which had been converted to parking use after abandonment of the railroad.

Appellants assert that these findings do not reflect the City's real reasons for the rezoning. They claim that the City and the other public agency appellees were exploring the possibility of acquiring the subject properties for transportation projects, and that the downzoning was intended to depress the value of the properties and prevent the construction of buildings so as to reduce the cost of acquisition. The record does indicate that various public agencies had been considering transportation improvements along the Santa Monica Boulevard corridor for years, and that these agencies were concerned about losing the opportunity to acquire this property if it were developed. The record also reflects that both the City Planning Department hearing examiner who considered the Santa Monica Boulevard zone change and the City Planning Commission cited preservation of the land for future transportation uses as one reason for the downzoning, although the City Council did not include this in its final list of findings. There is little evidence in the record that these same transportation concerns ever applied to the Sepulveda properties.

Since the time of the rezoning, appellants have filed no applications with the City to propose development of the properties. One of their lessees did file an application for a minor variance, seeking permission to operate a surface parking lot on the property enclosed only by a fence, rather than

the concrete block wall required by the zoning code. This request was denied by a zoning administrator in the City Department of Building and Safety. The record does not indicate that this denial was appealed.

The record contains no evidence that appellants had ever sought compensation for the alleged taking through other channels before filing this federal complaint.

Appellants filed this action in the district court on January 29, 1986. The complaint contained three counts: Count One alleged violation of appellants' federal constitutional rights to just compensation, due process, and equal protection under the fifth and fourteenth amendments and 42 U.S.C. section 1983, Count Two was a pendent state claim under the California Constitution, and Count Three alleged violations of the California Environmental Quality Act (CEQA). In addition to the City of Los Angeles, the complaint named the County of Los Angeles, the Los Angeles County Transportation Commission (LACTC), and Caltrans as defendants. Although the rezoning, over which the City of Los Angeles had sole authority, was the act which appellants claimed had caused them direct injury, the other agencies were alleged to have conspired with the City in preparation for this action.

The district court granted an early motion by Caltrans to dismiss without leave to amend on eleventh amendment grounds. This appeal includes an appeal of Caltrans' dismissal. The district court also dismissed the CEQA claim as to all defendants and this has not been appealed.

On May 20, 1988, the district court granted summary adjudication of a single issue in favor of plaintiffs, ruling that their "facial" constitutional claims were ripe for federal adjudication. The same order granted summary judgment in favor of defendants on all "as-applied" constitutional claims, ruling that the claims were unripe because plaintiffs had never filed a meaningful development application.

On December 14, 1988, the district court entered an order granting a motion for reconsideration of its May 20 order and subsequently entered summary judgment in favor of appellees on all claims.[2] Specifically the court found that all just compensation claims were unripe because even the facial claims required plaintiffs to seek compensation before filing suit. The court also found that there were no genuine issues of material fact regarding the due process and equal protection claims.

The notice of appeal was timely filed on January 10, 1989.[3]

DISCUSSION

1. Standard of Review

A grant of summary judgment is reviewed de novo to determine, viewing the evidence in the light most favorable to the

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[2]In their opening brief, appellants argue that because the memorandum which accompanied the judgment did not explicitly discuss the pendent state claim, there is confusion as to whether the judgment disposed of that claim. The notice of appeal indicates that appellants initially considered the judgment to be final and dispositive of all claims.

We agree with the appellants' first inclination. The judgment order of December 14, 1988 states that "defendants . . . are entitled to summary judgment. . . . plaintiffs shall have and recover nothing against defendants." This judgment clearly disposes of all claims brought by appellants against defendants including their pendent state claim.

On appeal appellants never discussed the merits of their pendent state claim. As a general rule, matters that are not specifically and distinctly raised and argued in appellants' opening brief are not considered by this court. *International Union of Bricklayers Local 20 v. Martin Jaska Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985). In the instant case, because the merits have not been explored by either party and appellees were never notified that the merits would be an issue on appeal, we will follow the general rule and decline to review the portion of the district court's order granting summary judgment on the state pendent claim.

[3]During the pendency of this appeal, appellants settled with appellee LACTC and the County of Los Angeles.

nonmoving party, whether there existed any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

Ripeness for federal adjudication is a question of law reviewed de novo. *Hoehne v. County of San Benito*, 870 F.2d 529, 531 (9th Cir. 1989).

II. Ripeness for Federal Adjudication

A. Ripeness Defined

[1] Constitutional challenges to local land use regulations are not considered by federal courts until the posture of the challenges makes them "ripe" for federal adjudication. Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed. *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 377 (9th Cir.), *cert. denied*, 109 S. Ct. 134 (1988). This deficiency may be raised sua sponte if not raised by the parties. *Id.*

B. Ripeness Under the Just Compensation Clause

1. As-applied Claim

[2] Ripeness of an as-applied challenge (i.e., a claim that as applied to a particular property a statute effects an uncompensated taking) involves two independent prerequisistes. First, since a court cannot determine whether a taking has occurred unless the extent of permissible development is clear, plaintiffs alleging an as-applied taking must show that they have obtained "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986). Second, since the

Constitution does not prohibit takings, but only takings without just compensation, "if a State provides an adequate procedure for seeking just compensation," plaintiffs may not bring as-applied claims to federal court until they have "used the procedure and been denied just compensation." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985). For the reasons which follow, we find that Southern Pacific and the other plaintiffs have met neither of these requirements and that the district court was correct in concluding that their claims are unripe for federal adjudication.[4]

a. Final Determination Regarding Allowable Development

(i). In General

[3] In applying the "final determination" requirement, courts have emphasized that local decision-makers must be given an opportunity to review at least one reasonable development proposal before an as-applied challenge to a land use regulation will be considered ripe. *E.g., Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir.), *modified*, 830 F.2d 968 (1987), *cert. denied*, 484 U.S. 1043 (1988). The development proposal must be "meaningful," which means that rejection of "exceedingly grandiose development plans" is insufficient to show that the local agency does not intend to allow reason-

[4]Exhaustion of state remedies is ordinarily not required for actions brought pursuant to 42 U.S.C. § 1983. *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982). However, the Supreme Court has held that "[t]he question whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable," *Hamilton Bank*, 473 U.S. at 192, and that ripeness of claims like this one may therefore be predicated on obtaining a final determination regarding permitted uses. *Id.* at 193. The court also held that the language of the fifth amendment requires property owners to utilize procedures for obtaining just compensation before alleging a taking in a section 1983 action. *Id.* at 194 n.13.

able development. *MacDonald*, 477 U.S. at 353 n.9. By the same token, other requests may be so minor that denial does not give a fair indication of how a comprehensive development plan would be handled.

The meaningful application requirement also mandates that claimants pursue the application thoroughly and not abandon it at an early stage. *See Kinzli*, 818 F.2d at 1455. Those who have not followed available routes of appeal cannot claim to have obtained a "final" decision, particularly if they have foregone an opportunity to bring their proposal before a decisionmaking body with broad authority to grant different forms of relief or to make policy decisions which might abate the alleged taking.[5]

The meaningful application requirement is not waived when a zoning ordinance only appears not to permit a reasonable economic return on a piece of property. In such cases, property owners are required to seek a reasonable return by applying for such variances as would provide it. *Hamilton Bank*, 473 U.S. at 172-73; *Kinzli*, 818 F.2d at 1454. The term "variance" is not definitive or talismanic; if other types of permits or actions are available and could provide similar relief, they must be sought. *See Hoehne*, 870 F.2d at 533-35

[5]Courts have imposed the meaningful application requirement even in instances where a regulation appeared on its face to be highly restrictive. One reason for this is that local agencies have wide authority to grant relief which might keep the regulation from denying the owner a reasonable economic return. "The local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other." *MacDonald*, 477 U.S. at 350 (discussing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978)). This flexibility is obviously useless if property owners abandon their applications after rejection by civil servants with narrow authority and before seeking relief from a body with broader powers.

(discussing availability of relief via conditional use permit, zone change, or General Plan amendment).[6]

[4] In this case, appellants have failed to satisfy the meaningful application requirement. Although they opposed the rezoning of the subject properties between 1983 and 1985, they gave no indication at that time of how they might intend to develop the property if permitted to do so. They filed no meaningful applications for development of the property, for variances, or for any other form of relief before filing this federal complaint.[7] To address this claim in this posture, federal courts would be required to guess what possible proposals appellants might have filed with the City, and how the City might have responded to these imaginary applications. It is precisely this type of speculation that the ripeness doctrine is intended to avoid. *Kinzli,* 818 F.2d at 1454. Since no meaningful application has been made, there has been no final determination regarding allowable development of these properties and the district court properly concluded that appellants' as-applied claim is not ripe for federal adjudication.

(ii). The Futility Exception

[5] Appellants contend that they should be excused from filing a meaningful application in this case, because the City's action in downzoning the properties makes it clear that any

[6]The *Hoehne* court found that the Hoehnes were excused from seeking these types of relief, but only because the facts of that case fell within the "futility exception" discussed *infra.*

[7]Appellants point to the minor variance denied to one of their lessees as evidence of a previous application, but that request was not meaningful. Refusal to permit erection of a fence rather than a wall around a parking lot gives no indication of how the City would respond to a major development application. The decision was based on specific safety and aesthetic concerns which would not pertain to other proposals. It was also the decision of a zoning administrator with limited authority to grant relief, and the available appeal apparently was not taken. *See id.* at 96.

such application would be futile. While it is true that something called a "futility exception" exists, this exception serves only to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved. The futility exception does not alter an owner's obligation to file one meaningful development proposal. *Kinzli*, 818 F.2d at 1455.

Appellants rely heavily on *Hoehne*, but their reliance is misplaced. In *Hoehne*, a property owner had made an application to divide a 60-acre parcel of land into four lots, with one home to be placed on each. The local board of supervisors denied the subdivision request, and immediately rezoned the property to a zone having a minimum lot size of 40 acres. The court held that this constituted a final determination of the permitted use of the Hoehnes' land, and that the Hoehnes were not required to apply for further variances or other types of permits before coming to court. 870 F.2d at 535. The *Hoehne* court emphasized that the meaningful application requirement had already been satisfied by the subdivision request; the only thing excused by invocation of the futility exception was "[r]e-application and re-submission." *Id.*

Appellants are not helped by the futility exception because, unlike the Hoehnes, they have never filed a meaningful application.

b. Denial of Just Compensation

[6] The second prong of the ripeness inquiry provides an additional reason why the as-applied claims are unripe. Appellants cannot claim a taking without just compensation unless they have sought compensation through any reasonable procedure provided by the state. *Hamilton Bank*, 473 U.S. at 194-97. To determine whether such procedures were available, courts look to the time when the alleged taking occurred. *Id.* at 194; *Hoehne*, 870 F.2d at 534. Appellants

consider this important because the alleged taking in this case took place before the U.S. Supreme Court ruled in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) that money damages must be available as a remedy when it is determined that a land use regulation has worked a taking. Prior to *First English*, the general rule in California was that landowners could seek only declaratory relief or mandamus in such cases, not damages. *Agins v. Tiburon*, 24 Cal. 3d 266, 275-77, 598 P.2d 29-31, 57 Cal. Rptr. 376-78 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980). Appellants claim that under *Agins*, there was no procedure available by which they might have sought compensation before resorting to federal court.

This claim is incorrect because the complaint filed in this action alleges unreasonable precondemnation activity, a cause of action for which money damages were available in California both before and after *Agins*. The essence of Southern Pacific's complaint is that "[t]he City Council's act of down-zoning the Subject Properties was unreasonable conduct taken by the City in anticipation of the condemnation of Plaintiffs' properties." Appellants assert that appellees sought to depress the value of these properties so that they could be acquired through eminent domain more cheaply than would otherwise have been possible.

The California Supreme Court ruled in *Klopping v. City of Whittier* that such wrongs were compensable. 8 Cal. 3d 39, 52, 500 P.2d 1335, 104 Cal. Rptr. 11 (1972). *Agins* did not eliminate this cause of action. In *Toso v. City of Santa Barbara*, 101 Cal. App. 3d 934, 162 Cal. Rptr. 210 (1980), the California Court of Appeal held that even after *Agins*, "inequitable zoning actions by a public agency undertaken as a prelude to public acquisition may result in an action for damages." *Id.* at 952.[8]

[8]Even if it were unclear that the *Klopping* cause of action had survived *Agins*, appellants would have been required to test this question by

[7] Under *Klopping* and *Toso*, a procedure for seeking just compensation existed when the alleged taking took place. Appellants failed to seek this compensation before filing their federal complaint. The district court properly concluded that this failure was fatal. Even if a taking had taken place, no claim that the just compensation clause had been violated would be ripe.

2. Facial claim

[8] Appellants also have brought a facial challenge to the City's action, in other words, a claim that the mere adoption of the ordinances constitutes an uncompensated taking. The district court found, and we agree, that this claim also is unripe for federal adjudication because plaintiffs have failed to satisfy the just compensation ripeness requirement.

[9] *Hamilton Bank* did not address the issue whether the ripeness hurdle, which stands in the way of as-appled challenges, also obstructs their facial counterparts. Indeed, some courts have found that it does not. *See e.g., Crow-New Jersey, 32 Ltd. v. Township of Clinton*, 718 F.Supp. 378, 382-83 (D.N.J. 1989) (holding facial challenges immune to either of *Hamilton Bank*'s ripeness tests). Moreover, the Supreme Court often has reached the merits of facial attacks without regard for ripeness considerations. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass'n. Inc.*, 452 U.S. 264 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980). In light of the ample confusion in this area, we take this opportunity to discuss the relevance of *Hamilton*

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attempting to secure compensation in the state courts. Claimants are required to seek compensation in state courts before filing federal complaints even when state remedies are uncertain and undeveloped. *Austin v. City and County of Honolulu*, 840 F.2d 680-81 (9th Cir.), *cert. denied*, 109 S. Ct. 136 (1988).

Bank's ripeness requirements to facial takings challenges. We conclude that a claim alleging that mere enactment of a statute effects an unconstitutional taking is unripe unless and until it is known what, if any, compensation is available.[9]

What distinguishes the present case from the above-mentioned Supreme Court precedents is its posture. *Agins, Hodel, Loretto* and *Keystone* all had to do exclusively with the question whether the regulation amounted to a taking. Although the Court reached the merits in each of them, that was only half the inquiry. The question whether just compensation was available, necessary to determine whether the alleged taking was unconstitutional, was simply not reached because it was unnecessary. In *Agins*, the state court denied plaintiffs' takings claim, holding that there simply had been no taking, and therefore no need for compensation. That was the sole question addressed by the Supreme Court. *Agins*, 447 U.S. at 260. In *Hodel*, the Court specifically noted that "an alleged taking is not unconstitutional unless just compensation is unavailable." *Hodel*, 452 U.S. at 297 n.40. In *Loretto*, the sole issue was whether the physical occupation of the property constituted a "taking" for which "just compensation is due." The Court's decision to reverse the state court rested on the finding that a taking had indeed occurred. The Court went on to say: "The issue of the amount of compensation

[9]In light of the district court's ruling, we need not decide whether *Hamilton Bank*'s first ripeness requirement might also apply to facial challenges. The Supreme Court has not addressed this question directly. In a number of instances, the Court has noted that certain facial challenges are impossible to evaluate absent some factual information regarding how the statute will be applied. This could lead to a ruling on the merits that, facially, the statute's "mere enactment" does not effect a taking, *see e.g., Keystone Butiminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 495-96 (1987), or to a jurisdictional determination that the issue is not ripe for resolution, *see e.g., Pennell v. San Jose*, 485 U.S. 1, 10 (1987). The point appears to be that some regulations, by their very nature, are just not subject to facial attack on takings grounds. Prior to their application, in other words, the attacks are simply premature.

that is due, on which we express no opinion, is a matter for the state courts to consider on remand." *Loretto*, 458 U.S. at 441.[10]

[10] The question we face here is whether the zoning ordinance effected an *unconstitutional, uncompensated* taking. To make this determination, we must first decide whether compensation is available. If such be the case, it would be "unnecessary" to resolve the taking claim for "[w]here the action . . . is a taking . . . the availability of a suit for compensation . . . will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment." *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 697 n.18 (1949); *see also Duke Power Co. v. Carolina Env. Study Group*, 438 U.S. 59, 94 n.39 (1978). Because appellants have not sought compensation through state procedures, *see supra*, this determination cannot be made. Accordingly, the ordinance is not appropriate for review — it is, as it were, "unripe."

First Lutheran Church v. Los Angeles, 482 U.S. 304 (1987), one of the few cases to reach the second, remedial question, provides support for the proposition that even facial challenges must overcome the just compensation ripeness hurdle.[11] The case involved a *facial* takings attack on a local

[10]As Justice Blackmun noted in dissent: "Happily, the Court leaves open the question whether [the statute] provides . . . sufficient compensation." *Id.* at 456 n.12 (Blackmun, J., dissenting).

[11]This is not to say that all facial challenges to zoning restrictions will be subject to this hurdle. In some instances, as we have seen, it will not be an issue because the court is simply considering whether a taking has occurred, not whether it is a taking "without just compensation." In others, no compensation would be sufficient to cure the constitutional infirmity. Some harms are "impermissible even if the government is willing to pay for them." *Hamilton Bank*, 473 U.S. at 202 (Stevens, J., concurring). "For example, even if the State is willing to compensate me, it has no right to appropriate my property because it does not agree with my political or religious views." *Id.* at 202 n.1. Likewise, takings that involve violations of the Equal Protection or Due Process clauses will be found unconstitutional notwithstanding any available compensation, for neither clause contains a remedial provision.

ordinance. The state court had held that, regardless of whether a taking had occurred, no compensation would be available. In reversing, the Supreme Court explicitly noted that plaintiffs had clearly met *Hamilton Bank*'s second ripeness requirement (which, it follows, applied), for the State had ruled that plaintiffs could not enjoy its compensatory procedures. *Id.* at 312 & n.6.

In short, in the absence of knowledge regarding the availability of compensation, appellants' challenges to the constitutionality of the ordinance are simply unripe — whether they be dressed in their "as-applied" or "facial" garb.

C. Other Federal Claims

[11] In addition to their just compensation claims, appellants allege that their rights to substantive due process and equal protection were violated by the City's actions. All as-applied challenges to regulatory takings, whether based on the just compensation clause, the due process clause or the equal protection clause, possess the same ripeness requirement: a final determination by the relevant governmental body. *See Pennell*, 485 U.S. 11 n.5; *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1317 (1990); *Herrington v. County of Sonoma*, 857 F.2d 567, 569 (9th Cir. 1988), *cert denied*, 109 S. Ct. 1557 (1989). Thus, appellants' as-applied due process and equal protection claims are as premature as the just compensation claims, because the "final determination" requirement, with the concomitant requirement that a meaningful development application be submitted, governs ripeness of these claims as well. *Hoehne*, 870 F.2d at 532; *Shelter Creek*, 838 F.2d at 379; *Kinzli*, 818 F.2d at 1455-56.

Appellants also contend that the mere adoption of the ordinance violated the due process and equal protection clauses. Neither the finality nor the just compensation ripeness requirement apply to such facial challenges. *See Pennell*, 485

U.S. at 11; *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990).

[12] Turning first to the claim that the City has acted arbitrarily in violation of the due process clause, we agree with the district court that appellants have presented us with no genuine issue of material fact. The standard for determining that a zoning ordinance fails to comport with substantive due process is demanding. As stated by the Supreme Court:

> [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

Williamson v. Lee Optical Co., 348 U.S. 483, 487-88 (1955). The prevention of traffic congestion is reason enough to justify the targetted ordinance. Appellants have not made sufficient factual allegations suggesting that zoning their property for parking was irrational. Accordingly, the zoning classification does not on its face violate the due process clause.

[13] Appellants' facial equal protection claim also must fail. Because Southern Pacific does not allege that the regulation discriminates against a suspect class, the standard of review is highly deferential. "[A]ppellees need only show that the classification scheme is 'rationally related to a legitimate state interest.' " *Pennell*, 485 U.S. at 14 (quoting *New Orleans v. Duke*, 427 U.S. 297, 303 (1976)). The City has set forth plausible reasons for its zoning policy and for its decision to focus on narrow strips of land such as appellants'. Presumably, the zoning might have been more equitable, perhaps even more logical, but on its face, the ordinance displays no outward sign of irrationality.

D. Disposition of Unripe Claims

[14] Because appellants' takings and as-applied due process and equal protection challenges are unripe, the district court

erred in granting summary judgement as to these claims. Ripeness is a threshold jurisdictional question; when claims are unripe the correct disposition is dismissal, not summary judgment. *Lai v. City and County of Honolulu*, 841 F.2d 301, 303 (9th Cir.), *cert. denied*, 109 S. Ct. 560 (1988); *Shelter Creek*, 838 F.2d at 380; *Kinzli*, 818 F.2d at 1457.

III. Dismissal of Caltrans

The district court dismissed the complaint as to defendant Caltrans, finding that as a state agency it was immune from suit under the eleventh amendment. Appellants argue that because they seek declaratory and injunctive relief, the eleventh amendment does not prohibit suing a state agency.

[15] Appellants are correct that "the Eleventh Amendment does not bar actions against state officers in their official capacities if the plaintiffs seek only a declaratory judgment or injunctive relief." *Chaloux v. Killeen*, 886 F.2d 247, 252 (9th Cir. 1989) (internal quotations omitted). However, in this case, appellants did not name state officials of Caltrans in their suit but instead sued Caltrans directly. "[I]n the absence of consent a suit in which the State or one of its agencies or department is named as the defendant is proscribed by the Eleventh Amendment. This jurisdictional bar applies regardless of the nature of the relief sought."[12] *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (citations omitted). Therefore, appellants' claims against Caltrans, undisputably a state agency, are prohibited by the eleventh amendment even though they sought prospective relief.

[12]The state has not consented to be sued under § 1983 and Congress did not override states' sovereign immunity when it enacted § 1983. *Will v. Michigan Dept. of State Police*, 109 S. Ct. 2304, 2309 (1989).

CONCLUSION

For the foregoing reasons, the district court's judgment as to plaintiffs' facial due process and equal protection claims is affirmed. The district court's judgment as to all other claims is vacated and remanded with instructions to dismiss without prejudice for lack of jurisdiction.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC TRANSPORTATION COMPANY; GEORGE GREGSON; PATRICIA GREGSON MILLINGTON; and EDWIN J. GREGSON,
Plaintiffs-Appellants,

v.

CITY OF LOS ANGELES; and CALIFORNIA DEPARTMENT OF TRANSPORTATION,
Defendants-Appellees.

No. 89-55100

D.C. No. CV 86-0685-RMT

OPINION

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding

Argued and Submitted
April 12, 1990—Pasadena, California

Filed September 7, 1990

Before: Dorothy W. Nelson, William A. Norris and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Nelson

SUMMARY

Constitutional Law

Vacating a district court judgment, the court of appeals held that claims involving the alleged taking of property with-

out just compensation were not ripe for judicial review and were, therefore, subject to dismissal for lack of jurisdiction.

Appellant Southern Pacific Transportation Company owned real property that once was dedicated as a railroad right-of-way. When the right-of-way was formally abandoned, the property was rezoned for surface parking only. Southern argued that the real reason for rezoning was the city's possibility of acquiring the property for transportation projects, and that the downzoning was intended to depress the value of the property, and prevent the construction of buildings so as to reduce the cost of acquisition. Although Southern opposed the rezoning, it did not forward a developmental proposal or suggested any alternatives other than continuance of the preexisting zoning. Southern argued that the city took their property without just compensation, and violated its rights to due process and equal protection. The district court dismissed the complaint as to a state agency on eleventh amendment grounds. It also entered summary judgment for all other defendants, finding that the just compensation claims were not ripe for federal adjudication and that no genuine issue of material fact remained on the due process and equal protection claims.

[1] The district court was correct in concluding that Southern's claims were unripe for review. [2] Southern failed to satisfy the meaningful application requirement to the zoning action. Although Southern opposed the rezoning of the property, they filed no meaningful application for development of the property, for variances, or for any other form of relief before filing its federal complaint. Since no meaningful application was made, there was no final determination regarding allowable development of the property in question, and the district court properly concluded that Southern's as-applied claim was not ripe for federal adjudication. [3] In addition, Southern was not helped by the futility exception because it never filed a meaningful application. [4] Southern's claim that there was no procedure available by which it might have

sought compensation before resorting to federal court was incorrect because the complaint alleged unreasonable precondemnation activity, a cause of action for which money damages were available under state law. [5] Because Southern failed to seek this compensation before filing its federal complaint, the district court properly concluded that this failure was fatal to both the as-applied and the facial claims. Even if a taking had taken place, no claim that the just compensation clause was violated would be ripe. [6] Southern's due process and equal protection claims were as premature as the just compensation claims, because the "final determination" requirement, with the concomitant requirement that a meaningful development application be submitted, governed ripeness of these claims as well. However, because Southern never submitted a meaningful application, the district court erred in reaching the merits of the due process and equal protection claims. [7] The correct disposition of unripe claims is dismissal. The district court erred in granting summary judgment. Accordingly, the district court's grant of summary judgment was vacated with orders to dismiss the action for lack of jurisdiction.

[8] The eleventh amendment does not bar actions against state officers in their official capacities if plaintiffs seek only a declaratory judgment or injunctive relief. However, in this case Southern did not name state officials of a state agency in their suit but instead sued the agency directly. As such, Southern's claims against the state agency were prohibited by the eleventh amendment even though they sought prospective relief.

COUNSEL

Vicki E. Land, Brown, Wingield & Canzoneri, Inc., Los Angeles, California, for the plaintiffs-appellants.

Patricia V. Tubert, Deputy City Attorney, Los Angeles, California, for the defendant-appellee.

Christopher Hiddleson, Los Angeles, California, for the defendant-appellee, California Department of Transportation.

OPINION

NELSON, Circuit Judge:

OVERVIEW

Appellants own real property in the City of Los Angeles which once was dedicated as a railroad right-of-way. The right-of-way was formally abandoned, and the city subsequently applied a zoning designation to the property which indicates that it may be used for surface parking only. Appellants complain that by this action the city, in conspiracy with other public agencies, took their property without just compensation and violated their rights to due process and equal protection.

The district court dismissed the complaint as to defendant California Department of Transportation (Caltrans) on eleventh amendment grounds. The court then entered summary judgment in favor of all other defendants, finding that the just compensation claims were not "ripe" for federal adjudication and that no genuine issue of material fact remained regarding the due process and equal protection claims.

The district court was correct in concluding that plaintiffs' just compensation claims were unripe, but erred by not recognizing that the due process and equal protection claims were also unripe. The court also erred in entering summary judgment. The correct disposition of unripe claims is dismissal.

We, therefore, vacate the judgment and remand with instructions to dismiss for lack of jurisdiction.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants own real property in the City of Los Angeles which once consisted of part of a railroad right-of-way. The former right-of-way was laid out in two long, narrow strips; one parallels Santa Monica Boulevard from the Beverly Hills city limit west to Sepulveda Boulevard, and the other parallels Sepulveda Boulevard from Santa Monica Boulevard south to Pico Boulevard.[1] Each of these strips is broken into numerous segments by cross streets. The strip which parallels Santa Monica Boulevard averages 50 feet in width, while the Sepulveda strip is 40 feet wide.

In the early 1980s, the railroad right-of-way bore a variety of residential, commercial, and industrial zoning designations, generally consistent with adjacent zoning in the neighborhoods through which the railroad ran. These designations had little practical effect as long as the rails were in use, since the property could not be physically developed anyway.

By 1983, rail traffic on these routes had become very light, and Southern Pacific petitioned the Interstate Commerce Commission (ICC) for permission to abandon the right-of-way.

In September 1983, the Los Angeles City Council responded to the petition for abandonment by initiating proceedings to rezone the properties to the [Q]P-1 zone, which permits surface parking only. The proposal was sent to the City Planning Department, and hearings were held. Appellants opposed the rezoning in those hearings, but the record does not indicate that they forwarded a development pro-

[1]Appellants own some, but not all, of this former right-of-way.

posal or suggested any alternatives other than continuance of the preexisting zoning.

On October 4, 1985, the City Council adopted ordinances implementing the rezoning. The Council made written findings which indicate that the reasons for the rezoning included concern for the unique shape and configuration of the properties, a lack of adequate parking facilities in the vicinity of the properties, and continuity with existing uses on the properties, some of which had been converted to parking use after abandonment of the railroad.

Appellants assert that these findings do not reflect the City's real reasons for the rezoning. They claim that the City and the other public agency appellees were exploring the possibility of acquiring the subject properties for transportation projects, and that the downzoning was intended to depress the value of the properties and prevent the construction of buildings so as to reduce the cost of acquisition. The record does indicate that various public agencies had been considering transportation improvements along the Santa Monica Boulevard corridor for years, and that these agencies were concerned about losing the opportunity to acquire this property if it were developed. The record also reflects that both the City Planning Department hearing examiner who considered the Santa Monica Boulevard zone change and the City Planning Commission cited preservation of the land for future transportation uses as one reason for the downzoning, although the City Council did not include this in its final list of findings. There is little evidence in the record that these same transportation concerns ever applied to the Sepulveda properties.

Since the time of the rezoning, appellants have filed no applications with the City to propose development of the properties. One of their lessees did file an application for a minor variance, seeking permission to operate a surface parking lot on the property enclosed only by a fence, rather than

the concrete block wall required by the zoning code. This request was denied by a zoning administrator in the City Department of Building and Safety. The record does not indicate that this denial was appealed.

The record contains no evidence that appellants had ever sought compensation for the alleged taking through other channels before filing this federal complaint.

Appellants filed this action in the district court on January 29, 1986. The complaint contained three counts: Count One alleged violation of appellants' federal constitutional rights to just compensation, due process, and equal protection under the fifth and fourteenth amendments and 42 U.S.C. section 1983, Count Two was a pendent state claim under the California Constitution, and Count Three alleged violations of the California Environmental Quality Act (CEQA). In addition to the City of Los Angeles, the complaint named the County of Los Angeles, the Los Angeles County Transportation Commission (LACTC), and Caltrans as defendants. Although the rezoning, over which the City of Los Angeles had sole authority, was the act which appellants claimed had caused them direct injury, the other agencies were alleged to have conspired with the City in preparation for this action.

The district court granted an early motion by Caltrans to dismiss without leave to amend on eleventh amendment grounds. This appeal includes an appeal of Caltrans' dismissal. The district court also dismissed the CEQA claim as to all defendants and this has not been appealed.

On May 20, 1988, the district court granted summary adjudication of a single issue in favor of plaintiffs, ruling that their "facial" constitutional claims were ripe for federal adjudication. The same order granted summary judgment in favor of defendants on all "as-applied" constitutional claims, ruling that the claims were unripe because plaintiffs had never filed a meaningful development application.

On December 14, 1988, the district court entered an order granting a motion for reconsideration of its May 20 order and subsequently entered summary judgment in favor of appellees on all claims.[2] Specifically the court found that all just compensation claims were unripe because even the facial claims required plaintiffs to seek compensation before filing suit. The court also found that there were no genuine issues of material fact regarding the due process and equal protection claims.

The notice of appeal was timely filed on January 10, 1989.[3]

DISCUSSION

I. Standard of Review

A grant of summary judgment is reviewed de novo to determine, viewing the evidence in the light most favorable to the

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[2]In their opening brief, appellants argue that because the memorandum which accompanied the judgment did not explicitly discuss the pendent state claim, there is confusion as to whether the judgment disposed of that claim. The notice of appeal indicates that appellants initially considered the judgment to be final and dispositive of all claims.

We agree with the appellants' first inclination. The judgment order of December 14, 1988 states that "defendants ... are entitled to summary judgment.... plaintiffs shall have and recover nothing against defendants." This judgment clearly disposes of all claims brought by appellants against defendants including their pendent state claim.

On appeal appellants never discussed the merits of their pendent state claim. As a general rule, matters that are not specifically and distinctly raised and argued in appellants' opening brief are not considered by this court. *International Union of Bricklayers Local 20 v. Martin Jaska Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985). In the instant case, because the merits have not been explored by either party and appellees were never notified that the merits would be an issue on appeal, we will follow the general rule and decline to review the portion of the district court's order granting summary judgment on the state pendent claim.

[3]During the pendency of this appeal, appellants settled with appellee LACTC and the County of Los Angeles.

nonmoving party, whether there existed any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire & Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir. 1989).

Ripeness for federal adjudication is a question of law reviewed de novo. *Hoehne v. County of San Benito*, 870 F.2d 529, 531 (9th Cir. 1989).

II. Ripeness for Federal Adjudication

A. Ripeness Defined

Constitutional challenges to local land use regulations are not considered by federal courts until the posture of the challenges makes them "ripe" for federal adjudication. Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed. *Shelter Creek Dev. Corp. v. City of Oxnard*, 838 F.2d 375, 377 (9th Cir.), *cert. denied*, 109 S. Ct. 134 (1988). This deficiency may be raised sua sponte if not raised by the parties. *Id.*

B. Ripeness Under the Just Compensation Clause

[1] Ripeness of a claim alleging a taking of property without just compensation involves two independent prerequisites. First, since a court cannot determine whether a taking has occurred unless the extent of permissible development is clear, plaintiffs alleging an as-applied taking must show that they have obtained "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986). Second, since the Constitution does not prohibit takings, but only takings without just compensation, "if a State provides an adequate procedure for seeking just compensation," plaintiffs may not bring as-applied *or* facial claims to federal court until they

have "used the procedure and been denied just compensation." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985). For the reasons which follow, we find that Southern Pacific and the other plaintiffs have met neither of these requirements and that the district court was correct in concluding that their claims are unripe for federal adjudication.[4]

1. Final Determination Regarding Allowable Development

a. In General

In applying the "final determination" requirement, courts have emphasized that local decision-makers must be given an opportunity to review at least one reasonable development proposal before an as-applied challenge to a land use regulation will be considered ripe. *E.g., Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir.), *modified*, 830 F.2d 968 (1987), *cert. denied*, 484 U.S. 1043 (1988). The development proposal must be "meaningful," which means that rejection of "exceedingly grandiose development plans" is insufficient to show that the local agency does not intend to allow reasonable development. *MacDonald*, 477 U.S. at 353 n.9. By the same token, other requests may be so minor that denial does not give a fair indication of how a comprehensive development plan would be handled.

[4]Exhaustion of state remedies is ordinarily not required for actions brought pursuant to 42 U.S.C. § 1983. *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982). However, the Supreme Court has held that "[t]he question whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable," *Hamilton Bank*, 473 U.S. at 192, and that ripeness of claims like this one may therefore be predicated on obtaining a final determination regarding permitted uses. *Id.* at 193. The court also held that the language of the fifth amendment requires property owners to utilize procedures for obtaining just compensation before alleging a taking in a section 1983 action. *Id.* at 194 n.13.

The meaningful application requirement also mandates that claimants pursue the application thoroughly and not abandon it at an early stage. *See Kinzli,* 818 F.2d at 1455. Those who have not followed available routes of appeal cannot claim to have obtained a "final" decision, particularly if they have foregone an opportunity to bring their proposal before a decisionmaking body with broad authority to grant different forms of relief or to make policy decisions which might abate the alleged taking.[5]

The meaningful application requirement is not waived when a zoning ordinance only appears not to permit a reasonable economic return on a piece of property. In such cases, property owners are required to seek a reasonable return by applying for such variances as would provide it. *Hamilton Bank,* 473 U.S. at 172-73; *Kinzli,* 818 F.2d at 1454. The term "variance" is not definitive or talismanic; if other types of permits or actions are available and could provide similar relief, they must be sought. *See Hoehne,* 870 F.2d at 533-35 (discussing availability of relief via conditional use permit, zone change, or General Plan amendment).[6]

[2] In this case, appellants have failed to satisfy the mean-

[5]Courts have imposed the meaningful application requirement even in instances where a regulation appeared on its face to be highly restrictive. One reason for this is that local agencies have wide authority to grant relief which might keep the regulation from denying the owner a reasonable economic return. "The local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other." *MacDonald,* 477 U.S. at 350 (discussing *Penn Cent. Transp. Co. v. New York City,* 438 U.S. 104 (1978)). This flexibility is obviously useless if property owners abandon their applications after rejection by civil servants with narrow authority and before seeking relief from a body with broader powers.

[6]The *Hoehne* court found that the Hoehnes were excused from seeking these types of relief, but only because the facts of that case fell within the "futility exception" discussed *infra.*

ingful application requirement. Although they opposed the rezoning of the subject properties between 1983 and 1985, they gave no indication at that time of how they might intend to develop the property if permitted to do so. They filed no meaningful applications for development of the property, for variances, or for any other form of relief before filing this federal complaint.[7] To address this claim in this posture, federal courts would be required to guess what possible proposals appellants might have filed with the City, and how the City might have responded to these imaginary applications. It is precisely this type of speculation that the ripeness doctrine is intended to avoid. *Kinzli,* 818 F.2d at 1454. Since no meaningful application has been made, there has been no final determination regarding allowable development of these properties and the district court properly concluded that appellants' as-applied claim is not ripe for federal adjudication.

b. The Futility Exception

Appellants contend that they should be excused from filing a meaningful application in this case, because the City's action in downzoning the properties makes it clear that any such application would be futile. While it is true that something called a "futility exception" exists, this exception serves only to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved. The futility exception does not alter an owner's

[7]Appellants point to the minor variance denied to one of their lessees as evidence of a previous application, but that request was not meaningful. Refusal to permit erection of a fence rather than a wall around a parking lot gives no indication of how the City would respond to a major development application. The decision was based on specific safety and aesthetic concerns which would not pertain to other proposals. It was also the decision of a zoning administrator with limited authority to grant relief, and the available appeal apparently was not taken. *See id.* at 96.

obligation to file one meaningful development proposal. *Kinzli*, 818 F.2d at 1455.

Appellants rely heavily on *Hoehne*, but their reliance is misplaced. In *Hoehne*, a property owner had made an application to divide a 60-acre parcel of land into four lots, with one home to be placed on each. The local board of supervisors denied the subdivision request, and immediately rezoned the property to a zone having a minimum lot size of 40 acres. The court held that this constituted a final determination of the permitted use of the Hoehnes' land, and that the Hoehnes were not required to apply for further variances or other types of permits before coming to court. 870 F.2d at 535. The *Hoehne* court emphasized that the meaningful application requirement had already been satisfied by the subdivision request; the only thing excused by invocation of the futility exception was "[r]e-application and re-submission." *Id.*

[3] Appellants are not helped by the futility exception because, unlike the Hoehnes, they have never filed a meaningful application.

2. Denial of Just Compensation

Appellants' failure to file a meaningful application disposes of the as-applied claims; the second prong of the ripeness inquiry provides an additional reason why the as-applied claims are unripe and also establishes that appellants' facial taking claim is unripe.

Appellants cannot claim a taking without just compensation unless they have sought compensation through any reasonable procedure provided by the state. *Hamilton Bank*, 473 U.S. at 194-97. To determine whether such procedures were available, courts look to the time when the alleged taking occurred. *Id.* at 194; *Hoehne*, 870 F.2d at 534. Appellants consider this important because the alleged taking in this case took place before the U.S. Supreme Court ruled in *First*

English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) that money damages must be available as a remedy when it is determined that a land use regulation has worked a taking. Prior to *First English,* the general rule in California was that landowners could seek only declaratory relief or mandamus in such cases, not damages. *Agins v. Tiburon,* 24 Cal. 3d 266, 275-77, 598 P.2d 29-31, 57 Cal. Rptr. 376-78 (1979), *aff'd on other grounds,* 447 U.S. 255 (1980). Appellants claim that under *Agins,* there was no procedure available by which they might have sought compensation before resorting to federal court.

[4] This claim is incorrect because the complaint filed in this action alleges unreasonable precondemnation activity, a cause of action for which money damages were available in California both before and after *Agins.* The essence of Southern Pacific's complaint is that "[t]he City Council's act of down-zoning the Subject Properties was unreasonable conduct taken by the City in anticipation of the condemnation of Plaintiffs' properties." Appellants assert that appellees sought to depress the value of these properties so that they could be acquired through eminent domain more cheaply than would otherwise have been possible.

The California Supreme Court ruled in *Klopping v. City of Whittier* that such wrongs were compensable. 8 Cal. 3d 39, 52, 500 P.2d 1335, 104 Cal. Rptr. 11 (1972). *Agins* did not eliminate this cause of action. In *Toso v. City of Santa Barbara,* 101 Cal. App. 3d 934, 162 Cal. Rptr. 210 (1980), the California Court of Appeal held that even after *Agins,* "inequitable zoning actions by a public agency undertaken as a prelude to public acquisition may result in an action for damages." *Id.* at 952.[8]

[8]Even if it were unclear that the *Klopping* cause of action had survived *Agins,* appellants would have been required to test this question by attempting to secure compensation in the state courts. Claimants are required to seek compensation in state courts before filing federal complaints even when state remedies are uncertain and undeveloped. *Austin v. City and County of Honolulu,* 840 F.2d 680-81 (9th Cir.), *cert. denied,* 109 S. Ct. 136 (1988).

[5] Under *Klopping* and *Toso*, a procedure for seeking just compensation existed when the alleged taking took place. Appellants failed to seek this compensation before filing their federal complaint. The district court properly concluded that this failure was fatal to both the as-applied and the facial claims. Even if a taking had taken place, no claim that the just compensation clause had been violated would be ripe.

C. Ripeness of Other Federal Claims

[6] In addition to their just compensation claims, appellants allege that their rights to due process and equal protection were violated by the City's actions. All challenges to regulatory takings, whether based on the just compensation clause, the due process clause or the equal protection clause, possess the same ripeness requirement: a final determination by the relevant governmental body. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1404 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1317 (1990); *Herrington v. County of Sonoma*, 857 F.2d 567, 569 (9th Cir. 1988), *cert denied*, 109 S. Ct. 1557 (1989). Thus, appellants' due process and equal protection claims are as premature as the just compensation claims, because the "final determination" requirement, with the concomitant requirement that a meaningful development application be submitted, governs ripeness of these claims as well. *Hoehne*, 870 F.2d at 532; *Shelter Creek*, 838 F.2d at 379; *Kinzli*, 818 F.2d at 1455-56.[9] Because appellants never submitted a meaningful application, the district court erred in reaching the merits of the due process and equal protection claims; they are not ripe.

[9]These cases do not indicate that there is any distinction between "facial" and "as-applied" claims under the due process and equal protection clauses when analyzing the ripeness of a claim of unconstitutional land use regulation. In cases like this one where the essence of the complaint is a violation of the just compensation clause, courts have generally been skeptical of attempts to "re-cast" the allegations under other constitutional theories in order to obtain review which could not be had under the just compensation clause itself. *See Kinzli*, 818 F.2d at 1455-56.

D. Disposition of Unripe Claims

[7] Because none of appellants' federal constitutional claims are ripe, the district court erred in granting summary judgment, which is a form of judgment on the merits. Ripeness is a threshold jurisdictional question; when claims are unripe the correct disposition is dismissal, not summary judgment. *Lai v. City and County of Honolulu,* 841 F.2d 301, 303 (9th Cir.), *cert. denied,* 109 S.Ct. 560 (1988); *Shelter Creek,* 838 F.2d at 380; *Kinzli,* 818 F.2d at 1457. Accordingly, we reverse the district court's judgment with orders to vacate the judgment and dismiss the action for lack of jurisdiction.

III. Dismissal of Caltrans

The district court dismissed the complaint as to defendant Caltrans, finding that as a state agency it was immune from suit under the eleventh amendment. Appellants argue that because they seek declaratory and injunctive relief, the eleventh amendment does not prohibit suing a state agency.

[8] Appellants are correct that "the Eleventh Amendment does not bar actions against state officers in their official capacities if the plaintiffs seek only a declaratory judgment or injunctive relief." *Chaloux v. Killeen,* 886 F.2d 247, 252 (9th Cir. 1989) (internal quotations omitted). However, in this case, appellants did not name state officials of Caltrans in their suit but instead sued Caltrans directly. "[I]n the absence of consent a suit in which the State or one of its agencies or department is named as the defendant is proscribed by the Eleventh Amendment. This jurisdictional bar applies regardless of the nature of the relief sought."[10] *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 100 (1984) (cita-

[10]The state has not consented to be sued under § 1983 and Congress did not override states' sovereign immunity when it enacted § 1983. *Will v. Michigan Dept. of State Police,* 109 S. Ct. 2304, 2309 (1989).

tions omitted). Therefore, appellants' claims against Caltrans, undisputably a state agency, are prohibited by the eleventh amendment even though they sought prospective relief.[11]

CONCLUSION

For the foregoing reasons, the district court's judgment is vacated and remanded with instructions to dismiss the entire action without prejudice for lack of jurisdiction.

REMANDED, with orders to VACATE the judgment and dismiss the complaint without prejudice.

[11]Appellants argue, in the alternative, that they should be permitted to amend their complaint to name state officials of Caltrans. We need not decide this issue because we are ordering the district court to dismiss the complaint without prejudice. If appellants should choose to bring this action again when their claims are ripe, they may include state officials of Caltrans as named defendants.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation, GEORGE GREGSON, PATRICIA GREGSON MILLINGTON and EDWIN J. GREGSON,
Plaintiffs,

vs.

THE CITY OF LOS ANGELES, a municipal corporation; THE COUNTY OF LOS ANGELES, a subdivision of the State of California; and THE LOS ANGELES COUNTY TRANSPORTATION COMMISSION, a regional transportation commission of the State of California,
Defendants.

No. CV 86-0685-RMT (JRx)
JUDGMENT

This court having reconsidered its previous denial of summary judgment and issued its memorandum concurrently herewith finding that defendants Los Angeles

City, Los Angeles County and Los Angeles County Transportation Commission are entitled to summary judgment,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiffs shall have and recover nothing against defendants Los Angeles City, Los Angeles County and Los Angeles County Transportation Commission.

Dated: December 12, 1988

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation, GEORGE GREGSON, PATRICIA GREGSON MILLINGTON and EDWIN J. GREGSON,
Plaintiffs,

vs.

THE CITY OF LOS ANGELES, a municipal corporation; THE COUNTY OF LOS ANGELES, a subdivision of the State of California; and THE LOS ANGELES COUNTY TRANSPORTATION COMMISSION, a regional transportation commission of the State of California,
Defendants.

No. CV 86-0685-RMT (JRx)
MEMORANDUM

In March 1974, the Los Angeles City Council adopted the West Los Angeles District Plan. Plaintiffs Southern Pacific Transportation Company ("SoPac"), et al. own two pieces of property located within the area subject to

the plan. On September 13 and 16, 1983, the City Council initiated zone change proceedings for these properties in response to the petition by plaintiff SoPac to the Interstate Commerce Commission for the abandonment of its railroad rights-of-way on the subject properties. The city Council referred these matters to the City Planning Department which held hearings on the zone changes and submitted its findings and recommendations to the City Council. On October 4, 1985, the City Council adopted two ordinances which rezoned the properties from residential and commercial uses to permit surface parking only.

On January 30, 1986, plaintiffs brought the instant action for taking without just compensation and violation of due process and equal protection rights claiming that defendants Los Angeles City ("City"), Los Angeles County ("County"), California Department of Transportation,[1] and the Los Angeles County Transportation Commission ("LACTC"), individually or collectively intend to condemn the subject properties for use as part of a public mass transportation system and the zoning ordinances were adopted on October 4, 1985 to prevent development and reduce the cost of acquisition.

Plaintiffs filed a motion for partial summary judgment, and defendants City, County and LACTC filed motions for summary judgment upon which this court granted partial summary judgment on the "as-applied" challenges for lack of ripeness due to the failure to secure a final decision from defendant City regarding applicable uses. As a result of said ruling, the facial challenges remained to be litigated.

Now defendant City has brought a motion for reconsideration. Having considered the pleadings and other

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[1] The California Department of Transportation has been dismissed on the basis of eleventh amendment immunity.

documents filed herein, the court has determined that reconsideration should be granted and that defendants City, County and LACTC are entitled to summary judgment.

CLAIM OF TAKING: INVERSE CONDEMNATION

Defendant City correctly argues that plaintiffs' inverse condemnation claim is not ripe for federal adjudication because they have not used the state's process for seeking compensation before bringing the action in federal court. A takings claim is an assertion that, in violation of the fifth amendment, "private property [has been] taken for public use, without just compensation. U.S.Const.amend V. In *Williamson County Regional Planning Commission v. Hamilton*, 473 U.S. 172, 194 (1985), the Court held that a party seeking just compensation "must seek compensation through the procedures the State has provided for doing so" before the case is ripe for federal court review. Similarly, in *Austin v. City and County of Honolulu*, 840 F.2d 678, 679 (9th Cir. 1988), the Court held that "[u]ntil [plaintiff] pursues unsuccessfully compensation in the state courts or those courts establish that he may not recover compensation through inverse condemnation procedures, his claim is not ripe for federal court review."

The state procedure for obtaining just compensation must be reasonable, certain and adequate. *Hamilton*, 473 U.S. at 194.

> [I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

> . . . [B]ecause the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, the State's action here is not "complete" until the State fails to provide adequate compensation for the taking.

Id. at 195

Plaintiffs contend that California did not offer an adequate procedure for seeking just compensation at the time of enactment of the ordinances citing *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979), *aff'd*, 447 U.S. 255 (1980) for the proposition that California law precluded and precludes recovery of damages in an inverse condemnation action where a constitutional challenge is asserted. There is, however, an exception to this rule: A damage action for unreasonable precondemnation conduct is not precluded. *Klopping v. City of Whittier*, 8 Cal.3d 39 (1972); *Agins v. City of Tiburon*, 24 Cal.3d at 277-78; *Toso v. City of Santa Barbara*, 101 Cal.App.3d 934, *cert. denied*, 449 U.S. 901 (1980).

Even if we assume that state remedies available are uncertain and undeveloped, *Hamilton* still applies requiring plaintiffs to pursue their state remedies before federal court review. *Austin*, 840 F.2d at 679.

EQUAL PROTECTION AND DUE PROCESS CLAIMS

In ruling on the summary judgment motions, this court held that the rational basis test applied to the equal protection and due process claims. In applying that test, this court found that, because there was an issue of fact as to whether defendant City had the improper purpose and intent to decrease property values to reduce the cost of acquisition in enacting the zoning ordinances, there

remained an issue of fact as to whether a legitimate state interest exists.

However, application of the rational basis test is not limited to the subjective interest or purpose intended to be served by the City Council. Instead, the test is whether the ordinances are rationally related to any conceivable legitimate state interest. " 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' " *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (quoting *McGowan v. Maryland*, 366 U.S. 420, 426 (1961)). The "requirement of substantive due process under the fourteenth amendment . . . is met if there was any conceivable rational basis for the zoning decision." *Shelton v. City of College Station*, 780 F.2d 475, 477 (5th Cir.) (en banc), *cert. denied*, __ U.S. __ (1986).

As this court has previously found that the subject ordinances could possibly advance the legitimate state interest of protecting against traffic congestion, the ordinances are rationally related to a legitimate state interest and, therefore, do not violate plaintiff's equal protection or due process rights.

CONCLUSION

Based on the foregoing, defendants City, County and LACTC are entitled to summary judgment.

Dated: December 12, 1988

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation, GEORGE GREGSON, PATRICIA GREGSON MILLINGTON and EDWIN J. GREGSON,
Plaintiffs,
vs.
THE CITY OF LOS ANGELES, a municipal corporation; THE COUNTY OF LOS ANGELES, a subdivision of the State of California; and THE LOS ANGELES COUNTY TRANSPORTATION COMMISSION, a regional transportation commission of the State of California,
Defendants.

No. CV 86-0685-RMT (JRx)

ORDER RE PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION AND DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

This matter having come before the court on the motion by plaintiff for summary adjudication of certain issues and the cross motions for summary judgment by defendants City of Los Angeles, County of Los Angeles and the Los Angeles County Transportation Commis-

sion, and this court having considered the pleadings and other documents filed herein and having filed a memorandum concurrently herewith,

IT IS ORDERED that the motion by plaintiffs for summary adjudication is granted as to the following matter:

> Plaintiffs' facial attacks based on claims of taking without just compensation and equal protection and substantive due process violations are ripe for adjudication.

IT IS FURTHER ORDERED that the motions by defendants for summary judgment are granted on plaintiffs' as-applied challenges based on claims of taking without just compensation and equal protection and substantive due process violations, as being not ripe for adjudication.

IT IS FURTHER ORDERED that in all other respects, plaintiffs' motion for summary adjudication and defendants' motions for summary judgment are denied.

Dated: 20 MAY 1988

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation, GEORGE GREGSON, PATRICIA GREGSON MILLINGTON and EDWIN J. GREGSON,
Plaintiffs,
vs.
THE CITY OF LOS ANGELES, a municipal corporation; THE COUNTY OF LOS ANGELES, a subdivision of the State of California; and THE LOS ANGELES COUNTY TRANSPORTATION COMMISSION, a regional transportation commission of the State of California,
Defendants.

No. CV 86-0685-RMT (JRx)
MEMORANDUM

This matter has come before the court on the motion by plaintiffs for summary adjudication on the following issues:

1. That plaintiffs' facial attacks based on claims of taking without just compensation and equal protection and substantive due process violations are ripe for

adjudication;[1]

2. That since 1956 to the present time, the City of Los Angeles has had a policy to prevent or frustrate the use of abandoned railroad rights-of-way for other than public transportation purposes; and

3. That the subject properties have been singled out for extraordinary and discriminatory zoning treatment, and on the cross-motions by defendants City of Los Angeles, County of Los Angeles, and the Los Angeles County Transportation Commission ("LACTC") for summary judgment.

Essentially, the underlying facts are as follows:

On March 21, 1974, the Los Angeles City Council adopted the West Los Angeles District Plan ("Plan"). Plaintiffs Southern Pacific Transportation Company ("SPTC"), et al. own two pieces of property located within the area subject to the Plan. The properties are located along Santa Monica Boulevard ("Santa Monica property") and Sepulveda Boulevard ("Speulveda (*sic*) property"). On September 13 and 16, 1983, the City Council adopted motions to initiate a zone change for these properties in response to SPTC's petition to the Interstate Commerce Commission for abandonment of its railroad rights-of-way on the subject properties. The City Council referred these matters to the City Planning Department which held hearings on the zone changes and submitted its findings and recommendations to the City Council. On October 4, 1985, the City council adopted two ordinances which rezoned the properties from residential and commercial uses to permit surface

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[1] In their reply brief, plaintiffs contend that their as-applied challenges are also ripe for adjudication. As discussed below, ripeness is an issue in an as-applied challenge. However, it is not an issue in a facial challenge and presents no barrier to adjudication of such a challenge.

parking only. On January 30, 1986, plaintiffs brought this action challenging the down-zoning of their property as inverse condemnation and violations of civil rights, due process and equal protection.

In a constitutional challenge to a zoning ordinance, the courts have recognized a distinction between "a claim that the mere enactment of a statute constitutes a taking [facial challenge] and a claim that the impact of government action on a specific piece of property requires the payment of just compensation [as-applied challenge]." *Keystone Bituminous Coal Association v. DeBenedictis*, __ U.S. __, 107 S.Ct. 1232, 1247 (1987). The test to be applied will depend on the type of challenge the plaintiff is making. As plaintiffs are making both types of challenges, their claims will be analyzed under the requirements of both.

I. Plaintiffs' Claim of Taking: As-Applied Challenge

The first issue that arises in an as-applied challenge is ripeness.

> [R]ipeness is a question of law which must be determined by the court . . . .
>
> In land use challenges, the doctrine of ripeness is intended to avoid premature adjudication or review of administrative action. It rests upon the idea that courts should not decide the impact of regulation until the full extent of the regulation has been finally fixed and the harm caused by it is measurable.

Herrington v. County of Sonoma, 834 F.2d 1488, 1494 (9th Cir. 1988).

"In order for an 'as applied' regulatory taking claim to be ripe, a plaintiff must establish two components:

(1) that the regulation has gone so far that it has 'taken' plaintiff's property; and (2) that any compensation tendered for such taking is not 'just.' " *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 830 F.2d 977, 980 (9th Cir. 1987) (citations omitted).

> To establish this first component of a regulatory takings claim, "an essential prerequisite" must be present: there must be a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. This "final and authoritative determination" must expose "the nature and extent of permitted development."

Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1453 (9th Cir. 1987) (citations omitted). The Supreme Court has interpreted this final determination to require at least two decisions against the plaintiffs: "(1) a rejected development plan, and (2) a denial of a variance." *id.* at 1454.

Here, the plaintiffs themselves have not submitted any development plans or requests for variances. Plaintiffs content that this final determination requirement has been met because one of its lessees applied for, but was denied, a variance to build a chain link fence instead of a concrete block wall as required by the ordinance. The Supreme Court has stated that "plaintiff must seek variances which would permit uses not allowed under the regulations." *id.* citing *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) The denial of the lessee's application for the chain link fence does not seek a variance or approval for a different use (i.e., other than surface parking) from what is allowed by the zoning ordinance. Thus, plain-

tiffs have not secured either of the two requisite decisions and have, therefore, failed the first component of an as-applied challenge.

The Ninth Circuit has recognized an exception to avoid the ripeness requirement of a final decision. "Under this exception, the requirement of the submission of a development plan is excused if such an application would be an 'idle and futile act.' " *Kinzli*, 818 F.2d at 1454. The plaintiff has the "heavy burden" of showing futility. *Lake Nacimiento Ranch*, 830 F.2d at 980. "[M]ere allegations by a property owner that it has done everything possible to obtain acceptance of a development proposal will not suffice to prove futility." *Herrington*, 834 F.2d at 1496. The Ninth Circuit has required that "at least one meaningful application" for a development project must be made. *Lake Nacimiento Ranch*, 830 F.2d at 980. *See also Kinzli*, 818 F.2d at 1454-1455. Since the plaintiffs have failed to submit any applications they cannot rely on the futility exception. The plaintiffs' as-applied challenge is therefore not ripe. Accordingly, the motions by defendants for summary judgment on plaintiffs' claim of a taking, as applied, should be granted, and plaintiffs' motion thereon should be denied.

II. Plaintiffs' Claims of Equal Protection and Due Process Violations: As-Applied Challenge

The plaintiffs have also asserted equal protection and due process claims as applied. The Ninth Circuit has held that such claims are not ripe for adjudication where the takings claim is not ripe. *Kinzli*, 818 F.2d at 1455-1456. In *Kinzli*, the court held that plaintiff's as-applied takings claim was not ripe because plaintiff failed to obtain a final decision denying their application

for development and a variance. With respect to the plaintiff's equal protection claim, the court stated that "the Kinzlis' equal protection claim is not ripe for consideration by the district court 'until planning authorities and state review entities make a final determination on the status of the property.' " *id.* at 1455. (Citation omitted.) The court further held that the final determination requirement also prevents plaintiff's substantive due process claim from being ripe. *id.* at 1456. As such, defendants' motions should be granted and plaintiffs' motion should be denied with respect to plaintiffs' equal protection and due process violations, as applied.

III. Plaintiffs' Claim of Taking: Facial Challenge

The plaintiffs claim they are making a facial challenge to the zoning restriction (i.e., that the mere enactment of the restriction constitutes a taking of its property). The Supreme Court has repeatedly stated that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary. Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 294-95 (1981) (citations omitted). Plaintiffs thus face an uphill battle in making a facial attack on the zoning restriction as a taking. *Keystone Bituminous Coal Association*, 107 S.Ct. at 1247.

The Supreme Court has established a test to be applied in a case of facial challenge to a zoning restriction. A zoning restriction is facially invalid if "(1) it does not substantially advance legitimate state interests or (2) it denies an owner economically viable use of his land."

Lake Nacimiento Ranch, 830 F.2d at 981 citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. at 295-96 (1981). The court has further stated that

> The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests.

Agins, 447 U.S. at 260 (citation omitted).

A. Substantially Advance Legitimate State Interest

> "Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements."

Nollan v. California Coastal Commission, 107 S.Ct. 3141, 3146-47 (1987)

Plaintiffs claim that the ordinances do not substantially advance a legitimate state interest, because the ordinances were enacted for the purpose of freezing the property in its undeveloped state or depressing the price of that property for later public acquisition. Defendant City of Los Angeles has proferred the following as reasons for enacting the ordinances: (1) traffic conges-

tion; (2) lack of adequate parking; (3) existing development of the surrounding properties; (4) the shape and location of plaintiffs' properties; (5) the stated goals of the Plan to improve circulation in the area and the highway-oriented designation of the subject properties on the Plan; and (6) the change in the character of the subject property due to abandoning the railroad rights-of-way.

The Supreme Court has indicated that governmental action is entitled to a presumption that it does advance the public interest. *See Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529 (1959) (exercise of police power is presumed to be constitutionally valid); *Salsburg v. Maryland*, 346 U.S. 545, 553 (1954) ("The presumption of reasonableness is with the State"); *United States v. Carolene Products Co.*, 304 U.S. 144, (1983) (exercise of police power will be upheld if any set of facts either known or which could be reasonably assumed affords support for it). The Supreme Court has also stated

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive . . . .
>
> * * *
>
> . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

City of Renton v. Playtime Theatres, Inc., 106 S.Ct. 925, 929 (1986), quoting *United States v. O'Brien*, 391 U.S. 367, 382-86 (1968). In *Agins*, 447 U.S. 255, the Supreme Court held that zoning regulations which protect residents from the ill effects of urbanization are a valid exercise of the police power. In upholding a

zoning ordinance that limited the plaintiff's property to one-family dwellings, accessory buildings, and open space uses, the court stated that "such governmental purposes long have been recognized as legitimate." *id.* at 261. The court also noted the findings of the defendant that "it is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as . . . traffic congestion . . . and other demonstrated consequences of urban sprawl." *id.* at n.8. In the instant case, the City claims that traffic congestion is one of the reasons for enacting the ordinance. Thus, the ordinance could possibly advance legitimate state interests.

Plaintiffs, however, contend that the City has a policy to prohibit or frustrate the use of discontinued railroad rights-of-way other than for public transportation purposes. Plaintiffs cite *People ex. rel. Department of Public Works v. Southern Transportation Company*, 33 Cal.App.3d 960, 109 Cal.Rptr. 585 (1973) which is an eminent domain case brought by the state to acquire lands formerly used as a railroad right-of-way and which was subject to a city zoning ordinance. In allowing the collateral attack on the zoning ordinance in the eminent domain proceeding, the court stated that "[s]ubstantial evidence supports the finding of the trial court that the zoning applied by the City of Los Angeles to the subject property was the implementation of a city policy to frustrate by discriminatory spot zoning development of discontinued railroad rights-of-way for other than street purposes." *id.* at 965. However, apparently the City was not a party to that action. Plaintiffs also provide evidence indicating a possible improper purpose. For example, in its recommendation to the City Council to change the zoning on the Santa Monica property, the City Planning Commission's findings state that:

> The limitation of the use of the subject property to surface parking only *until such time as it is acquired for transit uses* is consistent with the feature of the circulation policy .... The permanent feature of the [Q]P-1-0 zone is consistent with the above cited provisions of the Plan, *it being necessary to insure that no structures will be constructed on the subject property which will prevent or materially inhibit the acquisition and use of such property for rapid transit* or other transportation facilities as contemplated by the plan.

(emphasis added). Plaintiffs also point to a letter from the City Attorney to Councilman Zev Yaroslavsky, which comments on the proposed "Letter of Understanding" between California Department of Transportation and Cities and County. The letter states:

> The City may consider the interests and the safety of the public in determining the appropriate land usages of such a "center strip" and not permit usages which endanger the users of the property or the users of the adjacent streets .... However, *if* the *City agrees to* the *preservation of future transportation uses*" of the Southern Pacific property, such agreement will *seriously impact* on any *argument that* the City's land use *decisions* were *made in good faith* for the protection of the public.

(emphasis added). Although plaintiffs have raised a sufficient issue of fact as to the existence of a legitimate state interest to preclude summary judgment in favor of defendants, this court cannot say, as a matter of law, that the City has had a policy to frustrate use of abandoned railroad rights-of-way for other than public transportation purposes.

B. Economically Viable Use

"[T]he precise meaning of 'economically viable use' of land is elusive and has not been clarified by the Supreme Court." *Lake Nacimiento Ranch Co.*, 830 F.2d at 981 citing *MacLeod v. County of Santa Clara*, 749 F.2d 541 (9th Cir. 1984). The Ninth Circuit, however, has stated that "in facial challenges, the fact that a development restriction prevents an owner from recovering its initial investment or a favorable return on its investment does not mean that the restriction is constitutionally defective. 'Disappointed expectations in that regard cannot be turned into a taking.'" *Lake Nacimiento Ranch Co.*, 830 F.2d at 981 citing *William C. Haas & Co., Inc. v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) (citation omitted).

The court has considered the diminution in the value of the property as a result of the land use regulation. In *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), the Supreme Court upheld a regulation that reduced land value from $800,000 to $60,000. In *William C. Haas*, the Court upheld a regulation that reduced land value from $2,000,000 to approximately $100,000. These cases indicate that even a significant decrease in the value of the property will still be upheld. Here plaintiffs have not provided any proof regarding the value of the property before and after the regulation.

The Supreme Court has focused on the existence of permissible uses as a test for whether a development restriction denies an owner the economically viable use of its property. *Lake Nacimiento Ranch Co.*, 830 F.2d at 981. Plaintiffs are currently leasing portions of the properties to various lessees. Plaintiffs state they have received $165,753.00 for a six-month period on a portion of the Santa Monica property. Furthermore, the rent on 1,500 square feet of parking on the Sepulveda prop-

erty increased from $235 per month to $1,875 per month in 1986. Plaintiffs explain that the rental receipts do not reflect the current economic value of the property. Thus, plaintiffs have failed to make a showing that there was no available beneficial use under the ordinance.

However, because an issue of fact remains as to whether there is a legitimate state interest, motions for summary judgment by plaintiffs and defendants as to plaintiffs' facial challenge of a taking should be denied.

IV. Plaintiffs' Claims of Equal Protection and Due Process Violations: Facial Challenge

Plaintiffs assert an equal protection claim alleging that their property has been singled out for extraordinary and discriminatory zoning treatment.

The standard for examining an equal protection claim in the area of economics and social welfare is a rational basis test. "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' . . . 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' " *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (citations omitted).

A similar standard applies to substantive due process claims as well.

> The test for determining whether a law comports with substantive due process is whether the law is rationally related to a legitimate state interest. "The law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand

> for correction and that it might be thought that the particular legislative measure was a rational way to correct it. [*Rogin v. Bensalem Township*,] 616 F.2d at 689 (quoting *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88, 75 S.Ct. 461, 464, 99 L.Ed. 563 (1955)).
>
> * * *
>
> The federal courts largely defer to legislative judgment on such matters as zoning regulation "because of the recognition that the process of democratic political decisionmaking often entails the accommodation of competing interests, and thus necessarily produces laws that burden some groups and not others." This court will not substitute its judgment about land use policy and thereby undermine the legitimacy of democratic decisionmaking unless the local legislative judgment is without a plausible rational basis.

Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023, 1034-35 (3d Cir. 1987) (citation omitted).

The Supreme Court has compared the standard applied to the issue of legitimate state interest in a taking claim with that applied to due process or equal protection claims and has stated that

> our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State '*could rationally have decided*' the measure adopted might achieve the State's objective." . . . But there is no reason to believe (and the language

> of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical . . . .

Nollan v. California Coastal Commission, 107 S.Ct. at 3147, n.3. Thus, both the due process and equal protection claims are subject to a rational basis test (i.e., whether the law is rationally related to a legitimate state interest). Having concluded, above, that there remains an issue of fact as to whether a legitimate state interest exists, defendants' motions for summary judgment should be denied on both of these claims. Likewise, plaintiffs' motion for summary adjudication as to discriminatory zoning treatment should also be denied.

Dated: 20 MAY 1988

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAR 26 1991
Clerk, U.S. Court of Appeals

SOUTHERN PACIFIC TRANSPORTATION COMPANY; GEORGE GREGSON; PATRICIA GREGSON MILLINGTON; and EDWIN J. GREGSON,
Plaintiffs-Appellants,
v.
CITY OF LOS ANGELES; and CALIFORNIA DEPARTMENT OF TRANSPORTATION
Defendants-Appellees.

No. 89-55100
USDC No. CV 86-0685-RMT

ORDER

Before: D.W. NELSON, NORRIS and O'SCANNLAIN, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing enbanc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The Petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
DEC 4 1990
Cathy A. Catterson, Clerk
U.S. Court of Appeals

SOUTHERN PACIFIC TRANSPORTATION COMPANY, GEORGE GREGSON, PATRICIA GREGSON MILLINGTON, and EDWIN J. GREGSON,
Plaintiffs-Appellants,

v.

CITY OF LOS ANGELES, COUNTY OF LOS ANGELES, CALIFORNIA DEPARTMENT OF TRANSPORTATION and LOS ANGELES COUNTY TRANSPORTATION COMMISSION,
Defendants-Appellees.

No. 89-55100
DC No. CV 86-0685-RMT

ORDER

Before: NELSON, NORRIS and O'SCANNLAIN, Circuit Judges.

The appellant's emergency motion to vacate the amended opinion is ordered filed, and the motion is denied.

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation, GEORGE GREGSON, PATRICIA GREGSON MILLINGTON and EDWIN J. GREGSON,
Plaintiffs,

vs.

THE CITY OF LOS ANGELES, a municipal corporation; THE COUNTY OF LOS ANGELES, a subdivision of the State of California; and THE LOS ANGELES COUNTY TRANSPORTATION COMMISSION, a regional transportation commission of the State of California,
Defendants.

No. CV 86-0685-RMT (JRx)

ORDER GRANTING MOTION FOR RECONSIDERATION

This matter having come before the court on the motion by defendant City of Los Angeles for reconsideration of this court's previous denial of summary judgment, and this court having considered the pleadings and other documents filed herein and having filed its memorandum concurrently herewith.

IT IS ORDERED that the motion by defendant City of Los Angeles for reconsideration is granted.

Dated: December 12, 1988

/s/ Robert M. Takasugi
ROBERT M. TAKASUGI
United States District Judge

APPENDIX I

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC TRANSPORTATION COMPANY; GEORGE GREGSON; PATRICIA GREGSON MILLINGTON and EDWIN J. GREGSON,
Plaintiffs-Appellants,

v.

CITY OF LOS ANGELES; and CALIFORNIA DEPARTMENT OF TRANSPORTATION
Defendants-Appellees.

No. 89-55100
CV 86-0685-RMT

APPEAL from the United States District Court for the CENTRAL District of CALIFORNIA

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for

the CENTRAL District of CALIFORNIA and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said District Court in this Cause be, and hereby is VACATED and REMANDED.

LODGED
OCT 9 1990
Clerk, U.S. District Court
Central District of California
By Deputy

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST
OCT 1 1990
BY: /s/ ? M. CRUZ
Deputy Clerk

Filed and entered SEPTEMBER 7, 1990

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
Civil Minutes - Appeals

Case No. CV86-685 RMT Date October 11, 1990

Title Southern Pacific Transportation Co., et al., vs City of Los Angeles, et al.

Present: THE HON. Robert M. Takasugi , JUDGE

Victor P. Cruz	Not Present
Deputy Clerk	Court Reporter

Attorneys for Plaintiff	Attorneys for Defendant
1) Not Present	1) Not Present
2)	2)
3)	3)

Proceedings: Filing and Spreading Mandate of the Ninth Circuit Court of Appeals

[ ] In Court [X] In Chambers [ ] Counsel Notified
(No hearing necessary)

THE COURT ORDERS that the mandate of the Ninth Circuit Court of Appeals:

[ ] Affirming [X] Remanding [ ] Reversing and Remanding

[ ] Affirming in part, reversing in part

[ ] Dismissing Appeal

[ ] The record reflects that costs of the prevailing party were taxed by the Ninth Circuit Court of Appeals in the amount of $_____ on _____.

[X] Other IT IS ORDERED that the Court's Judgment, entered 12-14-88 is hereby VACATED.,
is hereby filed and spread upon the minutes of this U.S. District court.

(ENTERED _____) [ ] MAKE JS-5

IT IS FURTHER ORDERED that the complaint is dismissed without prejudice.

Initials of Deputy Clerk _____

APPENDIX K

SUPREME COURT OF THE UNITED STATES

No. A-939

Southern Pacific Transportation Company, et al.,

Petitioners

v.

City of Los Angeles, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same hereby, extended to and including August 23rd, 1991.

/s/ Sandra Day O'Connor
Associate Justice of the Supreme
Court of the United States

Dated this 17th
day of June, 1991.

APPENDIX L

DEPARTMENT OF CITY PLANNING
Room 561-I, City Hall
200 North Spring Street
Los Angeles, California 90012
485-3505

CITY OF LOS ANGELES
DEPARTMENT OF CITY PLANNING

RECOMMENDATION OF COMMISSION HEARING EXAMINER

CITY PLAN CASE NO. 83-417 ZC &HHD

Decision Date: January 19, 1984
75-Day Expiration Date: (None)
Council District No. 5
Districts: Westwood and West Los Angeles-Century City-Rancho Park

To: City Planning Commission
From: Commission Hearing Examiner Section
Requested by: COUNCIL'S OWN INITIATIVE
Subject: ZONE CHANGE -
HEIGHT DISTRICT CHANGE

TABLE OF CONTENTS

REQUEST AND RECOMMENDATION

PROPERTY INVOLVED: That portion of the railroad right of way in the median strip along Santa Monica Boulevard lying between westerly boundary of the City of Beverly Hills at Moreno Drive and Bentley Avenue (one block east of Sepulveda Boulevard).

EXISTING ZONES AND HEIGHT DISTRICTS:
R1-1, R4-1, C2-1, C2-1VL, R4-1-0, C2-1-0 and C2-1VL-0

INITIATED ZONES AND HEIGHT DISTRICT:
[Q]P-1 and [Q]P-1-0

EXAMINER'S RECOMMENDATION:
That the Commission Approve the request as initiated.

Approve and recommend the adoption of the rezoning and Height District ordinance by the City Council.

Adopt the following findings:

1. The subject property is located within the area covered by the Westwood Community and West Los Angeles District Plans, adopted by the City Council on July 25, 1972, and March 21, 1974, respectively, which indicates the subject property to be the alignment of the proposed Beverly Hills Freeway. Although the Beverly Hills Freeway has been eliminated as a future freeway, the recommended change of zone is consistent with the West Los Angeles District Plan to facilitate circulation which provides that, "All railroad rights of way should be redesignated to a new classification which would limit usages to those compatible with the shape of

the areas, the proximity to roadways and to adjoining and nearby uses."

2. The West Los Angeles District Plan further provides that "substantial improvements should be made to transportation facilities in the Santa Monica Boulevard Corridor, including improvements to Santa Monica Boulevard, rapid transit, ...". Currently, CalTrans, with the assistance of a SCAG Route 2 Advisory Committee, is preparing a comprehensive study and environmental impact report on transportation alternatives for better circulation along that portion of Santa Monica Boulevard to serve the West Los Angeles, Westwood, and Beverly Hills areas. *Therefore, the recommended change of zone would be in conformance with the Plan's goal in preserving the Santa Monica Corridor for eventual rapid transit needs of the area.*

3. The Planning Department's Environmental Review Committee, on October 26, 1983, determined that this project will not have a significant effect on the environment.

4. The recommended change of zone will relate to and have an effect upon the Highways and Freeways Element of the General Plan. However, procedural requirements to effectuate the zone change will assure compliance with this adopted General Plan Element.

5. Other than amending the Specific Zoning Plan and except as noted above, the recommended change of zone will not relate to or have an effect upon the General Plan, Specific Plans, or other General Plan Elements or plans in preparation by the Department of City Planning.

6. The zoning, as recommended, has been further restricted by the [Q] Qualifications imposed by this action, such limitations being necessary to protect the best interests of, and insure a development more compatible with the surrounding property; to secure an appropriate development in harmony with the General Plan; and to prevent or mitigate the potential adverse environmental effects of the zone change.

7. Based upon the above findings, the recommended change of zone is deemed consistent with the public necessity, convenience, general welfare, and good zoning practice.

/s/ Philip Y. Lyou
Philip Y. Lyou
Commission Hearing Examiner

RECOMMENDATION OF COMMISSION CHIEF EXAMINER

(X) I concur in the Examiner's recommendation

( ) I do not concur ( ) See attached report

( ) I concur, except ( ) See below*

/s/ Arch D. Crouch
Arch D. Crouch
Commission Chief Examiner

Date: 1-5-84

[Q] QUALIFICATION

Condition of Approval

1. The use of the subject property shall be limited to surface automobile parking.

CITY OF LOS ANGELES CALIFORNIA
(City seal and letterhead omitted.)
TOM BRADLEY
MAYOR
MAR 19 1984

Honorable City Council
City of Los Angeles
Room 395, City Hall

CITY PLAN CASE NO. 83-417 (ZC & HD)
COUNCIL DISTRICT NO. 5

The City Planning Commission recommends the changes of zone and Height District described in the attached report of its action. This case is presented in accord with the provisions of Section 12.32 of the Los Angeles Municipal Code.

After due consideration, the Commission found that these changes would be justified under the requirements of Section 97.2 of the Los Angeles City Charter. The Commission therefore recommends that your Honorable Body approve these changes.

Pursuant to Council Rule No. 59, the complete City Plan Case file and an ordinance approved by the Commission to effect the changes are being transmitted for your consideration and appropriate action.

CALVIN S. HAMILTON
Director of Planning

/s/ Raymond I. Norman, Secretary
City Planning Commission
RIN: ct
cc: Notification List

CITY PLANNING DEPARTMENT
ACTION OF THE CITY PLANNING COMMISSION

CITY PLAN CASE NO. 83-417 ZC & HD
DATE: January 19, 1984

Pursuant to the provisions of the Los Angeles City Charter, the City Planning commission adopted the attached FINDINGS as to relationship to and effect upon the General Plan of the City and that the recommended change will be in conformity with public necessity, convenience, general welfare and good zoning practice.

Recommendation:

Approved the Council-initiated change of zone and height district from the present R1-1 One-Family Dwelling Zone, R4-1 Multiple Dwelling Zone, C2-1 Commercial Zone, C2-1VL Commercial Zone, R4-1-0 Multiple Dwelling Zone, C2-1-0 Commercial Zone and C2-1VL-0 Commercial Zone to [Q]P1-1 and [Q]P-1-0 Automobile Parking Zones (Permanent Qualified Classification) on that portion of the railroad right-of-way in the median strip along Santa Monica Boulevard between the westerly boundary of the City of Beverly Hills at Moreno Drive and Bentley Avenue (one block east of Sepulveda Boulevard). The [Q]P-1 Zone was approved on the R1-1, R4-1, C2-1 and C2-1VL Zones and the [Q]P-1-0 on the R4-1-0, C2-1-0 and C2-1VL-0 Zones to permit surface parking only.

The rezoning shall be subject to the following permanent [Q] qualification.

1. The use of the subject property shall be limited to surface automobile parking.

Procedure:

Approved the adoption by the City Council of the ordinance effecting the zone and height district changes.

Report:

Concurred in the recommendations of the Commission Chief Examiner and Commission Hearing Examiner as to the zone and height district change-findings revised by the Commission.

Vote:

Moved:	Neiman
Seconded:	Garcia
Ayes:	Krueger
Absent:	Harrington, Maston

/s/ Raymond I. Norman, Secretary
Raymond I. Norman, Secretary
City Planning Commission

RIN:ct

CPC 83-417 Jan. 19, 1984

FINDINGS

1. The proposed change is consistent with the purposes, intent and provisions of the West Los Angeles District Plan (the "Plan"), which encourage the concentration of commercial and residential development in Century City, connected to other regional centers by a rapid transit network. The subject property is designated on the Plan as the location of the since-deleted Beverly Hills Freeway, and preserving it for a future rapid transit use by the imposition of a permanent surface parking zone is consistent with this policy as stated in the Plan.

2. The proposed change of zone implements the provision of the circulation policy of the Plan which states "All railroad rights of way should be redesignated to a new classification, which would limit usages to those compatible with the shape of the areas, the proximity of roadways and to adjoining and nearby uses." The [Q]P-1-0 zone is such a classification. The limitation of the use of the subject property to surface parking only until such time as it is acquired for transit uses is also consistent with the feature of the circulation policy which states in part: "Substantial improvements should be made to transportation facilities in the Santa Monica Boulevard Corridor, including . . . rapid transit."

3. The permanent feature of the [Q]P-1-0 zone is consistent with the above cited provisions of the Plan, it being necessary to insure that no structures will be constructed on the subject property which will prevent or materially inhibit the acquisition and use of such property for rapid transit or other

transportation facilities as contemplated by the Plan. The application of the permanent condition to this case is appropriate and consistent with the intent of Ordinance No. 158,206 authorizing permanent Q conditions, as it will prevent the zoning from reverting to the underlying zoning if the Q condition is not fulfilled within the time limit which would otherwise be applicable.

4. The Planning Department's Environment Review Committee determined on October 26, 1983 that this project will not have a significant effect on the environment. This determination is appropriate and demonstrable, especially when compared to the development which could take place under the present zoning and in light of the "holding" nature of the proposed zone.

5. Other than amending the Specific Zoning Plan and except as noted above, the recommended change of zone will not relate to or have an effect upon the General Plan, Specific Plans, or other General Plan, Specific Plans, or other General Plan Elements or plans in preparation by the Department of City Planning.

6. Based upon the above findings, the recommended change of zone is deemed consistent with the public necessity, convenience, general welfare, and good zoning practice.

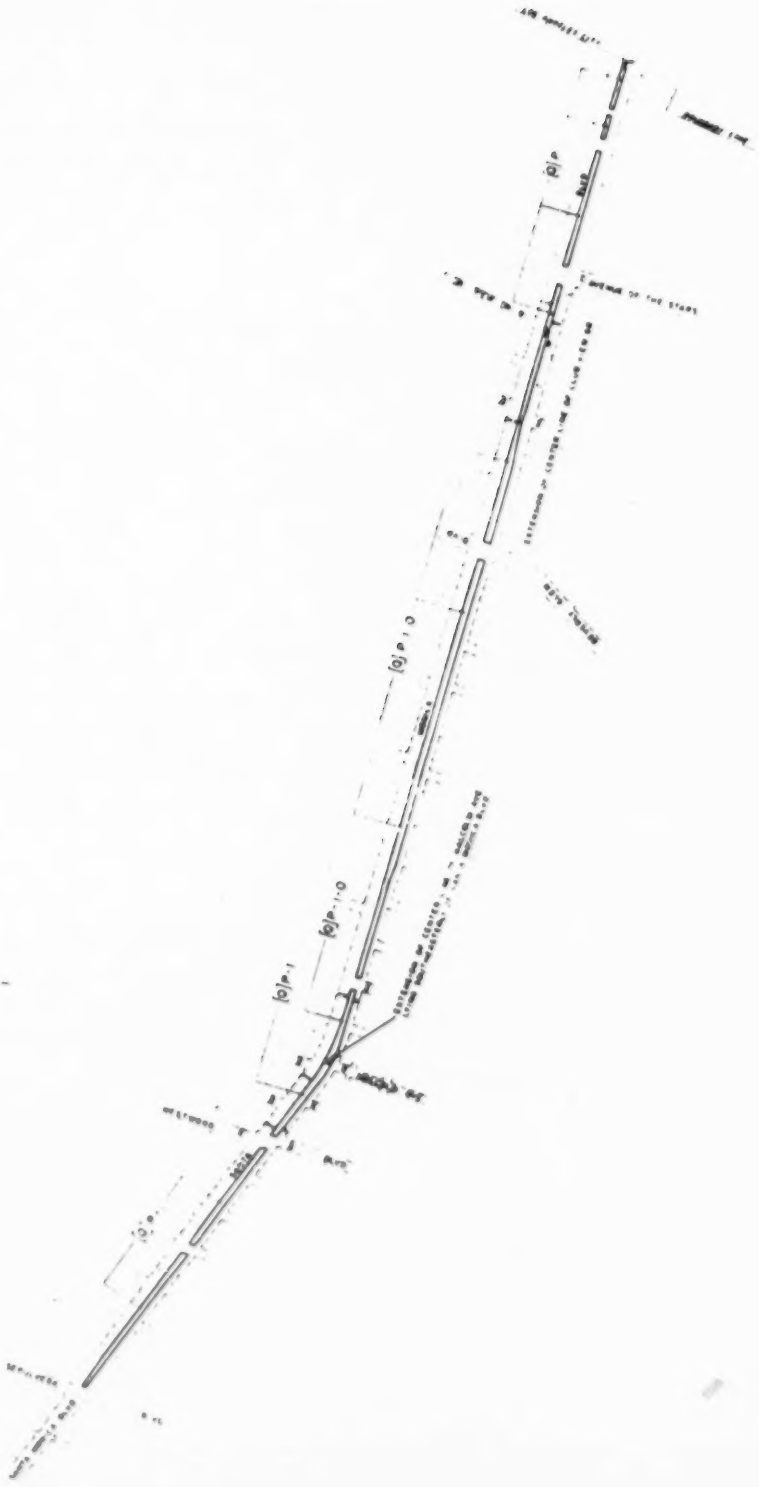
ORDINANCE NO. 160415

An ordinance amending Section 12.04 of the Los Angeles Municipal Code by amending the zoning map.

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS:

Section 1. Section 12.04 of the Los Angeles Municipal Code by hereby amended by changing the zones and zone boundaries shown upon a portion of the zone map attached thereto and made a part of Article 2, Chapter 1, of the Los Angeles Municipal Code, so that such portion of the zoning map shall be as follows:

Map



Sec. 2. Pursuant to Section 12.32 J of the Los Angeles Municipal Code, the following limitations are hereby imposed upon the use of that property shown in Section 1 hereof which is subject to the Permanent [Q] Qualified classification.

1. The use of the subject property shall be limited to surface automobile parking

Sec. 3. The City Clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles, at its meeting of October 4, 1985.

ELIAS MARTINEZ, City Clerk

By /s/ Edward W. Ashdon
Deputy

Approved Oct. 4, 1985

/s/ Pat Russell
ACTING Mayor

File no. 83-1632

D027927 G 75452 10/9

APPENDIX M

CITY OF LOS ANGELES
DEPARTMENT OF CITY PLANNING

RECOMMENDATION OF COMMISSION
CHIEF EXAMINER

CITY PLAN CASE NO. 83-419 ZC
DECISION DATE: 3-8-84

I do not concur with the recommendation of the Hearing Examiner to disapprove the Council-initiated proposed change of zone from M2-IVL to [Q]P-1 on the 40-foot wide railroad right of way along the west side of Sepulveda Boulevard between Santa Monica Boulevard and Pico Boulevard, and to initiate proceedings for the establishment of a 40-foot building setback line in lieu thereof.

The establishment of a building line would preclude the use of the property for parking or any other use than open space. Section 14.00 of the Planning and Zoning Code provides in part that: "It is the purpose of this article . . . to obtain a minimum uniform alignment from the street at which buildings, structures or improvements may be built or maintained . . .". The Zoning Engineer of the Department of Building and Safety has confirmed that the "improvements" cited by this provision include those improvements required for surface parking use, and that such improvements or such use is not permitted.

I believe, however, that it is essential that construction of any buildings or structures be restricted until it can be determined whether all or any part of this right of way will be required for public transportation purposes. The use of the property for surface parking would be permitted in the proposed [Q]P-1 Zone and would provide a suitable interim use for which there is an

evident need in this vicinity. Should it become apparent in the future that the [Q]P-1 Zone may be inappropriate for all or a portion of the property involved, the matter could best be considered in subsequent zone change proceedings.

The permanent [Q] classification will limit use to surface parking, excluding the underground structures which would otherwise be permitted.

(It should be noted that the intent of the change of Height District from HD 1VL to HD 1 is to bring it into consistency with the P Zone provisions which themselves preclude a structure with any height whatever. The three-story limitation of HD 1VL would be meaningless).

I recommend that the Commission:

Recommend that the City Council approve the initiated change of zone from M2-1VL to [Q]P-1, subject to the following [Q] provision: "That the use of the property be limited to surface parking."

Adopt the following findings:

1. The West Los Angeles District Plan clearly indicates use of the subject property over its entire length for a railroad by means of a symbol on the Plan Map. The scale of the Plan is such that the precise alignment of the railroad designation cannot be indicated; however, there is no question that the symbol was intended to identify the railroad which formerly occupied the subject right of way. The Plan also indicates Light Industry and Parking uses (M2, MR2 and P Zones) on adjacent properties to the east and west and on the portions of the subject

right of way (if any) which would not be occupied by the railroad tracks themselves. It has been common practice for community plans to designate railroad rights of way for the same uses as abutting properties.

2. The West Los Angeles Plan further provides that "All railroad rights of way should be redesignated to a new classification which would limit usages to those compatible with the shape of the area, the proximity to roadways and to adjoining and nearby uses."

3. The West Los Angeles Plan proposes that parking for industrial uses be provided at a ratio of one space for each 350 square feet of floor area. The Plan also calls for structural rehabilitation, street widening and additional off-street parking facilities in the industrial corridor along Sepulveda Boulevard, including the subject right of way. Adequate parking facilities are lacking, not generally having been provided as development has occurred. Portions of the subject right of way are now occupied by parking facilities under lease from the Southern Pacific Transportation Company.

4. The use of the subject property for the parking purposes permitted in the P Zone would constitute a beneficial use of the property in that additional off-street parking is needed along the entire subject corridor. The P Zone would be compatible with its shape, its ready access to Sepulveda Boulevard, and its proximity to industrial uses, all as called for by the District Plan.

5. The Los Angeles County Transportation Commission (LACTC) has in progress a study to designate a

light rail transit facility on a north-south alignment in the West Los Angeles area along the broad corridor designated by County Proposition A for this purpose. Study routes include the subject right of way. An alignment is expected to be determined some time in 1984. Further, the LACTC has proposed the ultimate extension of Metro Rail from Wilshire southerly along Sepulveda Boulevard to Olympic Boulevard.

6. The West Los Angeles Plan designates Sepulveda Boulevard as a major highway, with a 100-foot right of way width. The easterly 20 feet of the 40-foot wide subject property will eventually be required for its widening to that standard.

7. The Planning Department's Environmental Review Committee determined on November 16, 1983 that the subject zone change would not have a significant effect on the environment.

8. Other than amending the Specific Zoning Plan, and except as noted above, the recommended change of zone will not relate to, or have an effect upon other General Plan Elements, Specific Plans, or other plans in preparation by the Department of City Planning.

9. Based upon the above findings, the recommended change of zone is deemed consistent with the public necessity, convenience, general welfare, and good zoning practice.

/s/ Arch D. Crouch
Arch D. Crouch
Commission Chief Examiner

ADC/ad

CITY PLANNING DEPARTMENT
ACTION OF THE CITY PLANNING COMMISSION

CITY PLAN CASE NO. 83-419 ZC & HD
DATE: May 24, 1984
COUNCIL FILE NO. 83-1652, S-I

Pursuant to the provisions of the Los Angeles City Charter, the City Planning Commission adopted the FINDINGS of the Commission Chief Examiner as the FINDINGS of the Commission as to relationship to and effect upon the General Plan of the City and that the recommended change will be in conformity with public necessity, convenience, general welfare and good zoning practice.

Recommendation:

Approved the Council-initiated change of zone and height district from the present M2-1VL Light Industrial Zone to [Q]P-1 Automobile Parking Zone (Permanent Qualified Classification) on the 40-foot wide railroad right of way along the west side of Sepulveda Boulevard between Santa Monica Boulevard and Pico Boulevard.

The rezoning shall be subject to the following permanent limitation:

> That the use of the subject property shall be limited to surface parking

Procedure:

Approved the adoption by the City Council of the ordinance effecting this change.

Report:

Concurred in the recommendation of the Commission Chief Examiner.

Vote:

Move: Harrington
Seconded: Maston
Ayes: Krueger, Neiman, Garcia

/s/ Raymond I. Norman, Secretary
Raymond I. Norman, Secretary
City Planning Commission

RIN/ct

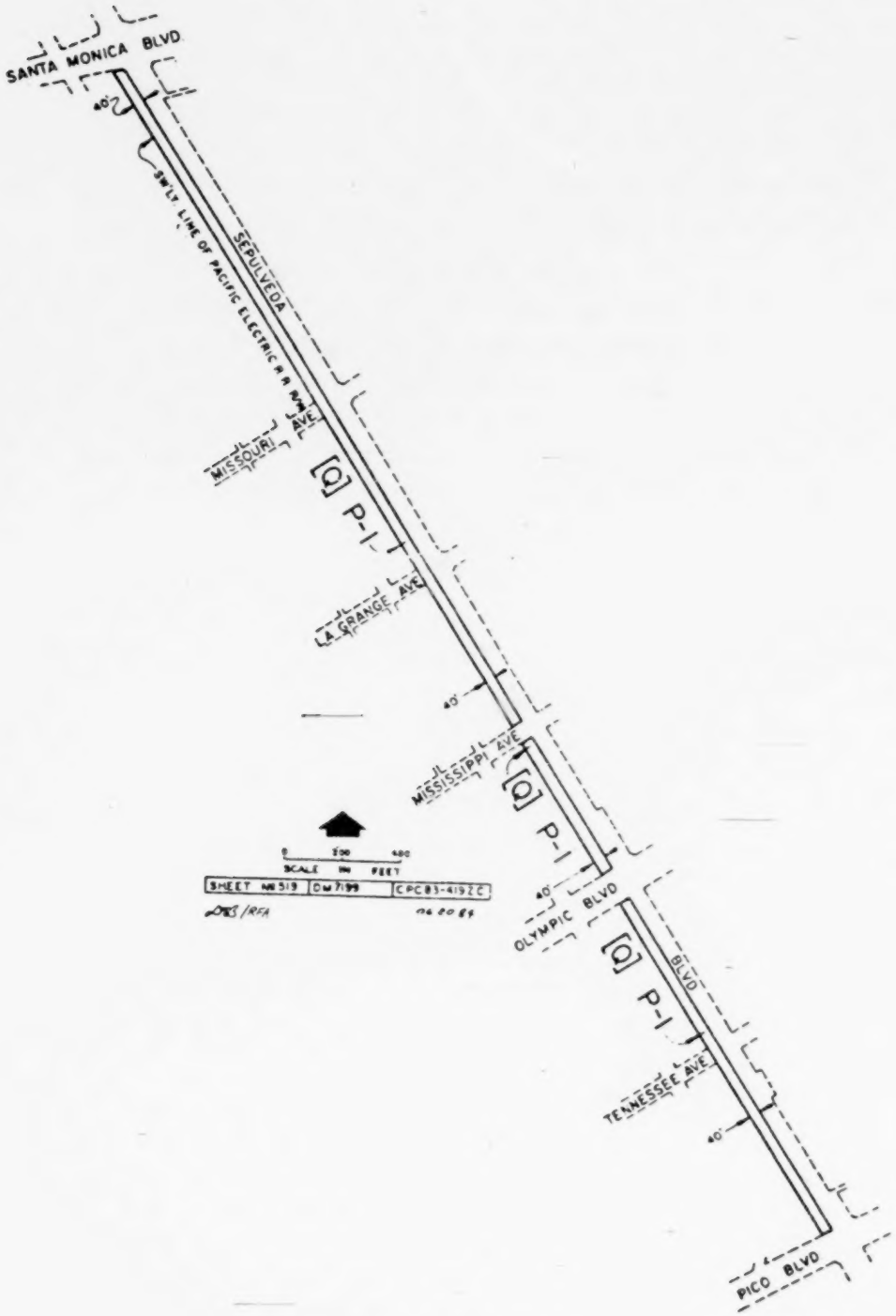
ORDINANCE NO. 160414

An ordinance amending Section 12.04 of the Los Angeles Municipal Code by amending the zoning map.

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS:

Section 1. Section 12.04 of the Los Angeles Municipal Code is hereby amended by changing the zones and zone boundaries shown upon a portion of the zone map attached thereto and made a part of Article 2, Chapter 1, of the Los Angeles Municipal Code, so that such portion of the zoning map shall be as follows:

Map


SANTA MONICA BLVD
40'
SW'LY LINE OF PACIFIC ELECTRIC R/W
SEPULVEDA
MISSOURI AVE
[Q] P-1
LA GRANGE AVE
40'
MISSISSIPPI AVE
[Q] P-1
0 200 400
SCALE IN FEET
SHEET NW 5-13
DW 7199
CPC 83-419 ZC
40'
OLYMPIC BLVD
[Q] P-1
BLVD
TENNESSEE AVE
40'
PICO BLVD

Sec. 2. Pursuant to Section 12.32 J of the Los Angeles Municipal Code, the following limitations are hereby imposed upon the use of that property shown in Section 1 hereof which is subject to the Permanent [Q] Qualified classification :

PERMANENT [Q]

That the use of the subject property shall be limited to surface automobile parking

Sec. 3 The city clerk shall certify to the passage of this ordinance and cause the same to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles, at its meeting of October 4, 1985.

ELIAS MARTINEZ, City Clerk

By /s/ Edward W. Ashdon
Deputy

Approved Oct. 4, 1985

/s/ Pat Russell
ACTING Mayor

File no. 83-1652-S1

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APPENDIX N

CHARTER OF THE CITY OF LOS ANGELES

Sec. 98. Office of Zoning Administration.

(1) There is hereby created as a quasi-judicial agency the Office of Zoning Administration. The functions and duties of this office shall be performed by one or more Zoning Administrators as authorized by the Council, who shall be appointed by the Director of Planning subject to the civil service provisions of this Charter. If more than one Zoning Administrator is authorized, a position of Chief Zoning Administrator shall be established, the appointment to which shall be made by the Director of Planning, and such others shall be Associate Zoning Administrators.

(2) Subject to such rules and regulations as the Council may prescribe by ordinance, the Chief Zoning Administrator and Associate Zoning Administrators shall have the following powers and duties:

(a) To investigate and make a determination upon appeals where it is alleged there is error or abuse of discretion in any order, requirement, decision or determination made by the Department of Building and Safety in the enforcement or administration of the provisions of any ordinance creating zoning districts or regulating the use of property in the city.

(b) To investigate and make a determination upon all applications for variances from any of the regulations and requirements of the zoning ordinances. Before granting an application for a variance a Zoning Administrator must find:

(i) that the strict application of the provisions of the zoning ordinance would result in impractical difficulties or unnecessary hardships inconsistent with the general purpose and intent of the zoning regulations.

(ii) that there are special circumstances applicable to the subject property such as size, shape, topography, location or surroundings that do not apply generally to other property in the same zone and vicinity.

(iii) that such variance is necessary for the preservation and enjoyment of a substantial property right or use generally possessed by other property in the same zone and vicinity but which, because of such special circumstance and practical difficulties or unnecessary hardships is denied to the property in question.

(iv) that the granting of such variance will not be materially detrimental to the public welfare, or injurious to the property or improvements in the same zone or vicinity in which the property is located, and

(v) that the granting of the variance will not adversely affect any element of the General Plan.

In granting a variance a Zoning Administrator shall impose such conditions as will remedy disparity of privileges and which are necessary to protect the public health, safety or welfare and assure compliance with the objectives of the General Plan and the purpose and intent of the zoning ordinance. A variance shall not be used to grant a special privilege, nor to permit a use substantially inconsistent with the limitations upon other properties in the same zone and vicinity, nor to grant relief from self-imposed hardships.

(c) To determine pursuant to procedures and limitations provided in the zoning ordinance, the proper classification of those uses not specificially [*sic*] listed in such ordinance.

(d) Under standards, limitations and procedures established by ordinance, to grant slight modifications in yard and area requirements of the zoning ordinance when circumstances make the literal application of the yard and area requirements impractical.

(3) Determinations by a Zoning Administrator shall be supported by written findings of fact based upon written and oral statements and documents presented to him, including photographs, maps and plans, together with the results of his investigations except that no written findings shall be required for the granting of slight modifications in yard or area requirements.

A Zoning Administrator shall make determinations on any matter under his jurisdiction as expeditiously as possible. The Council shall by ordinance provide time limits within which a Zoning Administrator must act for each type of case under his jurisdiction. If no determination is made by a Zoning Administrator within the prescribed time, the applicant may request that the matter be transferred to the jurisdiction of the Board of Zoning Appeals.

Upon making a determination upon any matter under his jurisdiction a Zoning Administrator shall forthwith place a copy of his findings and determination on file in the Department of City Planning and furnish a copy of the determination to the applicant and to the Department of Building and Safety. Such determination shall be final, except that an appeal may be taken as hereinafter provided. No determination by a Zoning Administrator, other than the granting of a slight modification in yard or area requirements, shall become effective until the expiration of an elapsed period after mailing notice to the applicant, which period shall be specified by ordinance. During this period an appeal from the determination may be taken to the Board of Zoning appeals. An appeal shall stay all proceedings in furtherance of the action appeal from pending its disposition.

(4) The Office of Zoning Administration may adopt such rules as it may deem necessary to carry out the rules and regulations prescribed by ordinance and which are not in conflict or inconsistent therewith. All such

rules and regulations shall be available for inspection in the Office of Zoning Administrations. (Sec. added, 1969.)

Each application for a variance should be determined upon the facts of the particular case.

The rule that the decision of an administrative board in refusing to grant a variance permit will not be disturbed by the courts in the absence of a clear and convincing showing of an abuse of discretion is equally applicable where such a board has granted a permit.

Childs v. City Planning Commission, 79 Cal. App. (2d) 808.